At trial, MORENO was acquitted of the drug charge, but convicted of the two misdemeanors and ultimately served 30 days in county jail. MORENO then filed this civil rights action alleging, *inter alia*, that the deputies unlawfully detained, searched and arrested him.

The district court denied the deputies' motion for summary judgment based on qualified immunity. APP 60-105. This decision was affirmed by the Ninth Circuit in a ***published*** opinion. APP 19-59. Because the original opinion concerned the constitutionality of a state statute, the State of California intervened in the case. *See* APP 106-107.

Thereafter, both petitioners and the State of California petitioned for rehearing *en banc*. The Ninth Circuit responded by withdrawing the original opinion and issuing a second ***published*** opinion affirming the denial of summary judgment. APP 1-17. The Ninth Circuit then denied a subsequent petition for rehearing, and rejected the petitioners' suggestion for rehearing *en banc*. APP 108-109.

Moreno's Prior Arrest, Parole Conditions, And Outstanding Warrants

On October 15, 1997, after serving a portion of his felony sentence on a drug charge in California State Prison, MORENO was granted early parole under a number of terms and conditions. In addition to the general parole condition that he not violate any law, MORENO was subjected to parole terms which required him to submit to narcotics testing and further authorized ***any*** law enforcement officer to conduct a warrantless search of him. AER 52.

As stated above, neither the terms of this parole agreement – nor the provisions of *Penal Code*, § 3067 – require either foreknowledge of the searching officer of the search provision nor do they require that the search be performed for a parole purpose rather than a law enforcement purpose. *Id.* MORENO ***voluntarily agreed*** to these express terms. California *Penal Code*, § 3067.

Following his release from custody but while still on parole, MORENO was cited for driving on a suspended license and for driving without insurance. When MORENO failed to appear for his arraignment on these charges, a warrant was issued for his arrest dated November 8, 1999. AER 46-47.

Moreno Is Detained By Law Enforcement

On January 21, 2000, BANKS and GARCIA, two sheriffs' deputies assigned to narcotics and related crime suppression duties, were on routine patrol in a high-drug neighborhood when they observed MORENO. According to the deputies, upon seeing the deputies, MORENO appeared startled, placed something on the step of an apartment house, and continued to walk away.[1] AER 42, 44.

Based on the high rate of narcotic crimes in the immediate area, MORENO's startled facial expression upon seeing the police, and his suspicious behavior in apparently removing something from his pocket and trying to discard it, the

[1] MORENO disputed this version, in part, at the summary judgment stage. Although he did not deny that something was discarded, MORENO indicated that he did not "bend or stoop" or "stop" *in order to* discard anything. AER 110.

deputies suspected that MORENO was in possession of illegal drugs.[2] AER 42.

BANKS and GARCIA stopped and detained MORENO as well as another man who was nearby. BANKS retrieved the discarded object and recognized it as rock cocaine, similar to other samples he had seized in at least 50 cases. AER 42.

Thereafter, using a computer terminal in their car, the deputies learned about MORENO's status as a parolee and about the outstanding arrest warrant. MORENO then was arrested for both possession of cocaine and the outstanding arrest warrant. Pursuant to standard procedure, BANKS and GARCIA also placed a parole hold on MORENO based on his status as a parolee. AER 42-45.

Plaintiff Sues Notwithstanding His Conviction On Two Separate Charges

Following a preliminary hearing, MORENO was held to answer on the narcotics charge, but was subsequently acquitted at trial. However, MORENO did plead *nolo contendere* to the charges of driving on a suspended license and driving without insurance. MORENO was placed on probation and ordered to serve 30 days in county jail. AER 48, 99.

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[2] Although the trial court determined that there was sufficient evidence to bind MORENO over for trial in the criminal matter, MORENO now disputes these facts. Accordingly, for the purposes of the underlying motion for summary judgment, petitioners are bound to accept as uncontroverted the fact that the initial detention was made without reasonable suspicion.

Despite this conviction, MORENO filed the instant civil rights case alleging *inter alia* that he was unlawfully detained, searched, and arrested. AER 1-19.

Petitioners BACA,[3] BANKS and GARCIA sought summary judgment on several grounds, including qualified immunity.[4] In support of their motion, BACA, BANKS and GARCIA established that MORENO was subject to both a parole search condition and an outstanding arrest warrant at the time of his arrest. Accordingly, BACA, BANKS and GARCIA contended that MORENO had no existing, legitimate constitutional rights that were capable of being violated by a law enforcement detention, search and arrest. AER 86.

After the Honorable Audrey Collins denied summary judgment based on qualified immunity, BACA, BANKS and GARCIA filed this interlocutory appeal.

The Panel's Opinion

On March 7, 2005, the Ninth Circuit issued a ***published*** decision in this case affirming the denial of summary

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[3] Petitioner LEROY BACA is the elected Sheriff of Los Angeles County.

[4] Petitioners also asserted that the because MORENO was held to answer on the criminal charges, the doctrine of collateral estoppel precluded him from attempting to re-litigate the issue of probable cause. This argument was rejected by the District Court, however, which found that the "litigation strategy exception" applied because MORENO's criminal attorney made a tactical decision to not challenge the issue of probable cause at the preliminary hearing. AER 104. However, only the qualified immunity portion of the order is subject to an immediate interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

judgment to BACA, BANKS and GARCIA. APP 19-59. In this opinion, the panel determined that notwithstanding the express conditions of MORENO's parole requiring him to violate no laws and to submit to suspicionless searches – express conditions to which MORENO voluntarily agreed – MORENO had some legitimate expectation of remaining free from these very provisions if the individual officers doing the search were not aware of either his parole status or any outstanding arrest warrants at the time of the stop.

In addition, although the undisputed facts demonstrated that MORENO pled *nolo contendere* to the offenses charged in the outstanding arrest warrant, the panel determined that MORENO could still articulate a viable claim for unlawful detention, search and arrest despite the rule articulated in *Heck v. Humphrey*, 512 U.S. 477 (1994).

Thereafter, the State of California intervened in the action, as the Panel's decision called into question the constitutionality of California *Penal Code*, § 3067, which provides that a parolee is subject to search or seizure at "any time of the day or night, with or without a search warrant and with or without cause." *See* APP 106-107.

Reconsideration Granted

On December 9, 2005, the Panel withdrew the previously issued opinion and issued an Order and Amended Opinion, which was also ***published***. APP 1-17. However, this amended opinion still conflicts with decisions of this Court, other decisions of the Circuit, and with authoritative decisions of other Courts of Appeal.

Thereafter, on January 23, 2006, the Ninth Circuit denied a second petition for hearing and rejected the petitioners' suggestion for rehearing *en banc*. APP 108-109.

This Petition follows.

REASONS FOR GRANTING CERTIORARI

California has the unfortunate distinction of having the highest recidivism rate for parolees in the nation. Indeed, at the February 22, 2006 oral argument in *Samson v. California*, Justice Scalia noted statistics from the government's brief which stated that 68% of all adult parolees are returned to prison, stating, "[I]t seems to me a breathtaking statistic like that may call for breathtaking measures to try to police the matter closely." Transcript of Argument, at 20.

One of the major tools used to combat this "breathtaking" problem is the suspicionless search provision of California *Penal Code*, § 3067. This statutory provision, to which most but not all incarcerated inmates consent, allows for "surprise searches" which are not premised on probable cause or even reasonable suspicion. Importantly, this provision does not include the requirement that a law enforcement officer who performs a suspicionless search have foreknowledge of the search condition or that the search be performed for a parole, rather than a law enforcement, purpose.

In *Samson v. California*, Supreme Court Case No. 04-9728, this Court will address the issue of whether California *Penal Code*, § 3067 violates the Fourth Amendment's prohibitions against unreasonable searches and seizures.

However, resolution of *Samson* leaves two important questions unanswered.

Does an individual who is subject to either a suspicionless parole search condition or an outstanding arrest warrant have a legitimate expectation of remaining free from detention and searches unless or until law enforcement officers become aware of either the individual's parole status and/or the outstanding warrant?

As stated herein, all parolees, in general, and MORENO, in particular, are required to submit to warrantless searches by any law enforcement officer as a condition of parole. *Penal Code*, § 3067. Although the California Legislature could have imposed the additional requirement that any such search be based on ~~either~~ foreknowledge of the search condition or a non-law-enforcement, parole purpose, the Legislature chose not to do so.

Given the express provisions of this conditional release from physical custody, no parolee could plausibly claim that he or she had a legitimate expectation of remaining free from detention and searches. Indeed, the rule advocated by the Ninth Circuit would encourage parolees to conceal their parole status from law enforcement officers in hope that any subsequent detention or search which might occur would be declared unconstitutional.

Thus, since MORENO could have no "justifiable," "reasonable," or "legitimate expectation" that he would not be stopped and searched by officers in light of his search condition and his outstanding warrant, he could not have suffered any infringement of a protected expectation.

Stated another way, how could the law enforcement officers violate MORENO's constitutional right to be free from suspicionless searches when he had agreed to consent to such searches as a condition of his early release from prison? In short, they could not. Absent a predicate underlying constitutional right, there can be no derivative violation.

Where an individual is subject to either a suspicionless parole search condition or an outstanding arrest warrant, does it matter whether law enforcement officers have any subjective foreknowledge of either the individual's parole status and/or the outstanding warrant?

Whether a parolee is entitled to reasonable expectation of privacy does not – and cannot – turn on such vagaries as whether a particular officer was aware of the search condition or the presence of the outstanding warrant at the time of the search.

Mindful that the exclusionary rule is designed to deter unlawful and improper police conduct (*United States v. Calandra*, 414 U.S. 338, 347-348 (1974); *United States v. Janis*, 428 U.S. 433, 446 (1976)), the emphasis should be on the ***conduct*** of the individual law enforcement officers, ***not*** their subjective foreknowledge. However, under the Ninth Circuit's view of the law as articulated in this case, one could obtain different results for the same conduct by two officers based on what each individual officer knew at the time. Surely this is not the state of the law, nor should it be.

Instead, whether or not a constitutional violation has occurred should turn on the facts of the case – not on the subjective intent of the law enforcement officers. This

Court, therefore, should mark a brighter line and, consistent with numerous opinions written by this Court, hold that where an individual has agreed to waive his or her right to remain free from suspicionless searches as a condition of parole – or where an individual has an outstanding arrest warrant – the individual cannot maintain an action for illegal search and seizure, so long as the search is performed in an otherwise reasonable manner.

Resolution of this case will have a dramatic impact on both criminal law and civil litigation throughout both the State of California and the nation as a whole. Accordingly, Certiorari is necessary to resolve these important federal questions, which conflict with prior United States Supreme Court precedent, Ninth Circuit precedent, and the well-settled view of the California Supreme Court. United States Supreme Court Rule 10.

ARGUMENT

I. CALIFORNIA *PENAL CODE* § 3067 AUTHORIZES SUSPICIONLESS SEARCHES OF PAROLEES WITHOUT REGARD TO EITHER LAW ENFORCEMENT FOREKNOWLEDGE OF THE SEARCH CONDITION OR THE EXISTENCE OF A VALID PAROLE PURPOSE

A. California *Penal Code*, § 3067 Authorizes Suspicionless Searches Of An Inmate Who Is Out Of Custody

Parolee recidivism is both a very real concern and a well-documented problem. To combat these problems, California has established a parole system whereby inmates may be released from physical custody, provided

the inmates abide by any number of terms and conditions. *Penal Code*, § 3067. During this time, however, the parolee is not a "free man." Instead, the parolee remains in the legal custody of the Department of Corrections while living in the community. *Penal Code*, § 3056. While serving out the balance of his or her term, the parolee must comply with all the terms and conditions of parole. *Penal Code*, § 3060.

Common parole terms include mandatory narcotics testing, prohibitions against violating any law, restrictions against associating with other felons or gang members, and periodic meetings with parole agents. In addition, under California law, all parolees are subject to search and seizure by any law enforcement officers, with or without reasonable suspicion. *Penal Code*, § 3067.

While it is true that all parolees are subject to warrantless, suspicionless searches, that does not mean that all inmates agree to abide by these parole terms. Rather, inmates have the choice of deciding whether they wish to be released from physical custody subject to increased monitoring and a diminished expectation of privacy, or to complete the balance of their parole terms in custody.

It is true that most inmates agree to the terms of parole (including a prospective partial waiver of their Fourth Amendment right to be free from warrantless, suspicionless searches) and elect to be released from physical custody. However, some inmates choose to refuse the terms of the parole grant and elect to serve out the remainder of the parole term in physical custody. *See Penal Code*, § 3060.5.

B. The Constitutionality Of California *Penal Code*, § 3067 Is Being Addressed By This Court In *Samson v. California*

In *United States v. Knights*, 534 U.S. 112 (2001), this Court held that a parole search "requires ***no more than*** reasonable suspicion to conduct a search of this probationer's house." *Id.* at 121. However, this Court did not reach the question of whether a search could be justified by ***less than*** reasonable suspicion (or no suspicion) or whether such a search can be justified based on advance consent. *See id.* at 118.

In *Samson v. California*, Supreme Court Case No. 04-9728, this Court will address some of the issues left unresolved in *Knights*. Specifically, in *Samson*, this Court granted certiorari on the following issue:

> "Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is the person is on parole?"

The "Questions Presented" in this case concern issues which were not addressed in *Knights* and which are related to – but will not be resolved by – this Court in *Samson*.

C. Both The California Courts And The Ninth Circuit Have Improperly Injected The Subjective Foreknowledge Requirement Into The California Parolee Search Statute

Both the language of *Penal Code*, § 3067 and the advance consent to search agreement signed by MORENO

in this case are clear. All parolees, in general, and MORENO, in particular, are required to submit to warrantless searches by any law enforcement officer as a condition of parole. *Penal Code*, § 3067; AER 52. Although the California Legislature could have imposed a requirement that any such search be based on either foreknowledge of the search condition or a parole (as opposed to law enforcement) purpose, the Legislature chose not to do so.

This notwithstanding, in *People v. Sanders*, 31 Cal.4th 318, 2 Cal.Rptr.3d 630 (Cal. 2003), the California Supreme Court issued an opinion which held that a suspicionless search of a parolee could not be upheld where the searching officer did not know about the individual's parole status at the time of the search. *Id.* at 332. In so holding, the California Supreme Court reasoned that the search could not be justified "because the officer is not acting pursuant to the conditions of parole." *Id.* at 333. This reasoning is fatally flawed, however.

Then, seizing on the faulty reasoning of *Sanders*, the Ninth Circuit has expanded this criminal exclusionary rule to the civil context, stating:

> "[A]n officer must know of a detainee's parole status before that person can be detained and searched pursuant to a parole condition. In fact, the California Supreme Court has recently so held. *People v. Sanders*, 73 P.2d 496, 505, 31 Cal.4th 318, 2 Cal.Rptr.3d 630 (Cal. 2003) (holding that the "police cannot justify an otherwise unlawful search of a residence because, unbeknownst to the police, a resident of the dwelling was on parole and subject to a search condition").
>
> "For all of these reasons, we hold that police officers cannot retroactively justify a suspicionless

search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole condition." *Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005); APP 13.

As such, resolution of this case will have a dramatic impact on both criminal law and civil litigation throughout both the State of California and the nation as a whole. It is axiomatic that the exclusionary rule is designed to deter unlawful police conduct. *United States v. Calandra*, 414 U.S. at 347-348; *see also United States v. Janis*, 428 U.S. at 446 (the prime purpose of the exclusionary rule, if not the sole one, is to deter future unlawful police conduct). However, as the law stands currently, the emphasis is not on the ***conduct*** of the individual law enforcement officers, but rather on their own subjective foreknowledge. Thus, one could obtain different results for the same conduct by two officers based on what each individual officer knew at the time. Surely this is not the state of the law, nor should it be.

II. A PLAINTIFF CANNOT SUE FOR AN ALLEGED VIOLATION OF HIS OR HER RIGHT TO BE FREE FROM UNREASONABLE DETENTIONS AND SEARCHES WHERE THERE WAS EITHER AN OUTSTANDING WARRANT FOR THE PLAINTIFF'S ARREST OR, AS A CONDITION OF PAROLE, THE PLAINTIFF HAD AGREED TO SUBMIT TO SUSPICIONLESS SEARCHES

A. A Parolee Or An Individual With An Outstanding Arrest Warrant Has No Legitimate Expectation Of Remaining Free From Detention And Searches

"The capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who

claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "The applicability of the Fourth Amendment turns on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (citation and internal punctuation omitted).

Indeed, this Court has held repeatedly that there is a "violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure." *United States v. Padilla*, 508 U.S. 77, 81 (1993).

But how can a parolee or probationer who knows he is subject to suspicionless search and seizure by any officer he may confront reasonably maintain that he nevertheless had a subjective expectation that he would not be searched? And how can he justifiably contend that society should find it objectively reasonable for him to expect so?

Rather, this Court has repeatedly indicated that reviewing courts should not reflexively order suppression of evidence, merely because police search or seizure activity might not be objectively justifiable in the abstract. *Arizona v. Evans*, 514 U.S. 1, 14 (1995); *Illinois v. Krull*, 490 U.S. 340, 353 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 333, n. 3 (1985); *United States v. Leon*, 468 U.S. 897, 906 (1984). And the Court has repeatedly applied this principle where the proponent of a motion to exclude evidence is unable to establish that challenged police conduct violated his personal, existing, legitimate rights under the Fourth Amendment. *Alderman v. United States*, 394 U.S. 165, 174 (1969); *Brown v. United States*, 411 U.S.

223, 230 (1973); *Rakas v. Illinois*, 439 U.S. at 148-149; *United States v. Salvucci*, 448 U.S. 83, 95 (1980); *United States v. Padilla*, 508 U.S. at 81; *Minnesota v. Carter*, 525 U.S. 83, 90-91 (1998).

Applying these teachings to the case of a parolee or probationer who is lawfully subject to suspicionless search and seizure – and who therefore cannot establish a personal, existing, legitimate expectation of remaining free from such intrusions – resolves the issue in this case, without resort to collateral inquiries as to the officer's foreknowledge of the condition, or the existence of particularized suspicion.

Similarly, neither MORENO nor any other parolee is entitled to the benefit afforded by an increased expectation of remaining free from custody by virtue of the lack of knowledge of any individual law enforcement officer. To do otherwise would be to condone a policy whereby parolees sought to engage in subterfuge and deception to prevent law enforcement officers from discovering their prior contacts with law enforcement.

Indeed, given the broad language of the waiver elicited in this case, there is no basis for the judicial creation of a distinction based on the individual subjective knowledge of any particular law enforcement officer. *See* AER 052; *Penal Code*, § 3067. Either the Legislature or the Department of Corrections could have included the caveat that potential parole searches be subject to foreknowledge of the searching officer. This was not done. And in the absence of such language, MORENO cannot now be heard to say that he had an expectation of remaining free from such detentions and searches.

B. The Clear and Express Terms Of California's Statutory Parole Agreement Allow For Suspicionless Searches Regardless Of Foreknowledge

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). This consent must be voluntary to be constitutionally valid. *Id.* at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

For Fourth Amendment purposes, an individual's consent to search may be deemed voluntary even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. *See Schneckloth*, 412 U.S. at 228.

Moreover, an individual may authorize advance consent to a search. *See Zap v. United States*, 328 U.S. 624, 627 (1946).[5] Such an advance consent term, sometimes known as a "Fourth Waiver," is a common term of probation in California. *See United States v. Ooley*, 116 F.3d 370, 371 (9th Cir. 1997).

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[5] Although *Zap* was vacated on other grounds (*see Zap v. United States*, 330 U.S. 800 (1947), this Court has cited it repeatedly for the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. *See Schneckloth*, 412 U.S. at 219; *Katz v. United States*, 389 U.S. 347, 358, n. 22 (1967); *Texas v. Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

The California Supreme Court has held that individuals convicted of crimes may be required to consent to future warrantless searches as a condition of probation, and that a consent to search obtained in that manner is valid and enforceable. *See, e.g., People v. Bravo*, 43 Cal.3d 600, 605-611, 238 Cal.Rptr. 282 (Cal. 1987); *People v. Mason*, 5 Cal.3d 759, 764-766, 97 Cal.Rptr. 302 (Cal. 1971), disapproved on other grounds in *People v. Lent*, 15 Cal.3d 481, 486, n. 6, 124 Cal.Rptr. 905 (Cal. 1975).

The rule that an individual may voluntarily provide advance consent to a search that might otherwise be prohibited by the Fourth Amendment accords with the general principle that an individual may, within broad limits, enter into agreements with the government under which he or she forgoes the exercise of constitutional rights in return for a promise of favorable treatment. Such agreements are not rendered unenforceable simply because the waiver of rights is prompted by the desire to obtain a benefit or avoid a burden, or because the individual is forced to choose between two unattractive alternatives.

For example, in the criminal context, it is beyond dispute that a negotiated criminal plea agreement may be valid and enforceable even where it is motivated by the defendant's belief that he or she is likely to face greater punishment if the case proceeds to trial. *See Brady v. United States*, 397 U.S. 742, 755 (1970) ("plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.").

In this case, the Department of Corrections and MORENO entered into an agreement whereby, in exchange for early release from physical custody, MORENO

agreed to submit to warrantless searches and seizures. AER 052. To attempt to re-write the express terms of this agreement would not only be contrary to fundamental maxims of contract law, but also contrary to important public policy.

As this Court noted in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), "it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law." *Id.* at 880. Thus, while it is true that the State is concerned about a parolee's reintegration into society, it also has the other concern, quite justified, that a parolee will be more likely to engage in criminal conduct than an ordinary member of the community. *Knights*, 534 U.S. at 120-121. In fact, as indicated in Justice Scalia's comments at the argument in *Samson*, given the "breathtaking" rate of 68% recidivism, such concerns are well founded.

In addition, the California Court of Appeal has noted, a "parolee constitutes a calculated risk to the safety and security of the community" and "requires his close supervision by his parole officer." *People v. Nicholson*, 123 Cal.App.4th 823, 830, 20 Cal.Rptr.3d 476 (Cal.App. 2004). Supervision during this transition is crucial to the State's interest in protecting the community.

In California, the ability of law enforcement to conduct random parole sweeps is crucial to its ability to monitor parolees more closely and to enforce the terms of their probation. This, in turn, helps to deter the parolees from engaging in additional criminal conduct, thereby protecting society.

Moreover, by allowing parolees the opportunity to consent to such terms, the long-term interests of the class

may be furthered. As the California Supreme Court observed in *People v. Bravo*, 43 Cal.3d 600, if:

> "A probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose." *Id.* at 609.

Finally, if a contrary view were given currency, it would have a detrimental impact both on California's ability to manage effectively its parole system and on a sentencing judge's options. Knowing that recently released inmates would not be subject to increased scrutiny, sentencing judges would be inclined to impose heftier sentences than they might otherwise, given the assurances of close supervision during the crucial parole re-integration period.

Even worse, it would render the language of *Penal Code*, §3067 a nullity and serve to re-write the manifest intent of the parties which executed the parole release agreement, along with the explicit search conditions, as an express condition of early release from physical custody.

C. Since A Valid Outstanding Arrest Warrant Had Been Issued By A Judicial Officer, Moreno Cannot State A Cause Of Action For An Illegal Detention, Search And Arrest, As A Matter Of Law

If MORENO had not been subject to warrantless detention and search, and if there had been no outstanding

warrant for his arrest, the proper focus would *then* have been on the justification for the deputies' acts. But this was not the case. To skip ahead to the question of whether the deputies would have been justified in their actions as to a person who had a *normal* scope of Fourth Amendment protection is to bypass the mandated "first inquiry" as to whether or not *this* plaintiff, MORENO, suffered a constitutional deprivation – which in turn requires examining the *extent* of his Fourth Amendment rights – if any – at the relevant time.

This much has been learned from a considerable body of Fourth Amendment cases: a person who cannot show that his own legitimate expectations were violated cannot claim the protections of the Fourth Amendment, or invoke the consequences of its violation – and this is true even if the official actions might not be justifiable in the abstract. *Minnesota v. Carter*, 525 U.S. at 91 (even if entry was illegal, it did not violate visitors' Fourth Amendment rights, because they had no legitimate expectation of privacy in the apartment); *United States v. Padilla*, 508 U.S. at 81-82 (1993) (even if car stop was illegal, it did not violate absent co-conspirator's Fourth Amendment rights); *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) (even if police search of purse was illegal, owner's friend had no Fourth Amendment rights infringed); *Rakas v. Illinois*, 439 U.S. at 131 (even if vehicle search was illegal, it did not violate passengers' Fourth Amendment rights); *Alderman v. United States*, 394 U.S. at 171-72 (even if electronic surveillance of a home was illegal, nonresident had no Fourth Amendment rights violated); *Martinez v. Nygaard*, 831 F.2d 822, 825-26 (9th Cir. 1987) (even if a workplace search warrant was invalid, entry and search did not violate the Fourth Amendment rights of employees);

United States v. Henderson, 746 F.2d 619, 624 (9th Cir. 1984) (even if electronic beeper was illegally installed, it did not violate nonresidents' Fourth Amendment rights).

Likewise here, even if the deputies' justification for their detention, search and arrest of MORENO was subject to a factual dispute, these acts did not violate any Fourth Amendment rights that Moreno had, because he was already subject to detention, search and arrest.

If a person named in an arrest warrant still has a legitimate right to require a peace officer to establish independent probable cause to arrest him, he is no different than a person for whom no warrant of arrest exists. But there is no question that an arrest warrant eliminates the need for police to develop independent probable cause for arrest. "A person arrested under a warrant would have received a prior judicial determination of probable cause." *Gerstein v. Pugh,* 420 U.S. 103, 118, n. 18 (1975).

Simply stated, how could one be subject to illegal arrest and detention when a valid outstanding warrant had been issued for the individual's arrest by a neutral magistrate? In short, he could not.

Accordingly, even if the actions of BANKS and GARCIA were otherwise unjustifiable, the arrest warrant eliminated MORENO's Fourth Amendment protection against detention, search and arrest.

D. An Officer's Subjective Knowledge Or Intent Is Inapposite To The Issue Of Whether A Constitutional Violation Has Occurred

Equal protection of the law is not possible if the degree to which a person is protected by the Constitution

is made to be dependent upon the subjective state of mind of the individual police officer the person chances to encounter.

In fact, this Court has consistently rejected attempts to tie claims of constitutional error to the motives, intents, or other states of mind of particular police officers. *Devenpeck v. Alford*, 543 U.S. 146, 153-154 (2004) (officer's subjective analysis of probable cause for arrest not determinative); *Whren v. United States*, 517 U.S. 806, 812-13 (1996) (officer's subjective intent not controlling as to justification for detention); *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (*per curiam*) (same); *Scott v. United States*, 436 U.S. 128, 138 (1978) (officer's subjective state of mind not dispositive); *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (same); *Horton v. California*, 496 U.S. 128, 138 (1990) (objective standards control, "rather than standards that depend upon the subjective state of mind of the officer"); *United States v. Leon*, 468 U.S. at 922, n. 23 (exploring officers' mindsets to assess constitutional claims "would produce a grave and fruitless misallocation of judicial resources"); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (officer's subjective plan to arrest does not constitute *Miranda* "custody"); *Stansbury v. California*, 511 U.S. 318, 324 (1994) (officer's subjective focus of suspicion "does not bear upon the question whether the individual is in custody for purposes of *Miranda*"); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (determination of *Miranda* "interrogation" not dependent on "the intent of the police"); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (officer's subjective lack of fear irrelevant to validity of search incident to arrest).

These and other cases stand for the proposition that objective facts, rather than subjective knowledge or

suspicions, should be considered in deciding the threshold question of whether or not a person's own legitimate rights could potentially be violated by the contested police conduct. If it appears from the objective facts that no violation could occur, the constitutional inquiry is ended.

Despite this wealth of case authority, both the California Supreme Court in *Sanders* and the Ninth Circuit in *Moreno* are attempting to graft a subjective knowledge element into this analysis. These efforts constitute a serious departure from prior case authority from this Court.

Can a car thief acquire a violable right not to have his victim's automobile searched, merely because the officer who stops him is initially unaware that the car is stolen? Of course not. *Rakas v. Illinois*, 439 U.S. at 141, n. 9. Can a burglar or drug dealer acquire a violable right against warrantless entry of another's home, merely because the officer who entered to arrest him may not have been aware of his status? Surely not. *Minnesota v. Carter*, 525 U.S. at 90-91. Can a parolee or probationer acquire a violable right not to be stopped and searched on the street, merely because the officer may not have realized the person was subject to suspicionless search and seizure? It makes no sense to hold that he can.

Simply stated, a police officer cannot violate a nonexistent right, regardless of the officer's intent.

In this case, the Ninth Circuit has erroneously concluded that a police officer's lack of foreknowledge of the parolee's or probationer's search condition somehow makes unreasonable a search that would be valid if conducted by another officer who happened to be aware of the condition. This decision spoke of the impermissibility of attempting

"retroactive justification" of a parole or probation search or seizure by the after-acquired knowledge that the person was subject to suspicionless search and seizure.

But as discussed above, there is no issue of justification with respect to parole and probation searches, retroactive or otherwise, so these rulings – which together currently control every parole and probation search in California – are misdirected, and should be corrected. The Court should affirm that no level of suspicion is required in order to conduct a reasonable search or seizure of one who is subject to a valid condition of parole or probation allowing such actions. And the Court should make clear that police lack of foreknowledge of the parole or probationary status of an individual does not revive a temporarily extinguished right.

E. Procedural Safeguards Still Exist To Monitor The Nature And Scope Of Parole Searches And Arrests Subject To An Outstanding Warrant

Finally, contrary to the protestations of MORENO and the concerns of the Ninth Circuit, limitations on the scope of proper parole searches and arrests subject to an outstanding warrant are in place.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court said that Fourth Amendment "reasonableness" has four components. Courts evaluating a search or seizure "must consider [1] the scope of the particular intrusion, [2] the manner in which it is conducted, [3] the justification for initiating it, and [4] the place in which it is conducted." *Id.* at 559.

A parole search condition or the presence of an outstanding arrest warrant addresses only the third of these factors – justification. The need for any independent, objective justification for a search or seizure (normally some level of suspicion, or consent or a warrant) has been extinguished, for the duration of parole or probation.

This is not a complete elimination of the person's Fourth Amendment protection, for officers' actions must still be reasonable under the three remaining factors. It would not be reasonable, for example, for officers to show up at a parolee's home every night at 3:00 a.m. to conduct a harassing search. The limitations of *Bell* factors 1, 2 and 4 remain as constraints on a searching officer's authority to conduct a search or seizure, even of a parolee or probationer, thereby preventing any justified search from being conducted in an oppressive manner. "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968).

But *Bell* factor 3 simply is not in issue *whenever* a parolee or probationer who has agreed to be subject to police activity that would otherwise require the objective justification necessary to search or seize a non-parolee. The elimination of the need to prove an independent justification for a parole or probation search or seizure is the extent to which the Fourth Amendment rights of the parolee have been "significantly diminished." *Knights*, 534 U.S. at 120.

Both the California Supreme Court in *Sanders* and the Ninth Circuit in *Moreno* approach parole searches as if they were subject to the normal Fourth Amendment balancing test, under which courts evaluate justification for a search or seizure by weighing the degree of intrusion upon protected individual interests against the need to promote legitimate governmental interests. *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). This approach – applied by the decisions upon which the judgment against petitioner was based – is both incorrect and unnecessary in the context of parole and probation searches and seizures. To prevent further misunderstanding, this Court should explain the proper analysis.

If the need for independent justification has been lawfully dispensed with, as in parole searches and seizures, conducting a balancing test to assess justification is quite beside the point. The balancing test is appropriate only when independent justification is in issue – namely, when the person contesting a search or seizure can establish that the police conduct infringed his or her own personal, reasonable expectation of remaining free from such intrusions.

Instead of evaluating justification through a balancing exercise, courts should confine their evaluations of parole searches and seizures to a consideration of whether officers exceeded the lawful scope of the condition, or acted in an unreasonable manner in carrying out a search or seizure for which no separate justification is required to be proven.

Simply stated, because a parolee agrees to submit to the search, he or she has no right to be free from warrantless, suspicionless searches. And, consequently, there

is no constitutional infringement to be remedied by way of either the exclusionary rule in the criminal context or a suit pursuant to 42 U.S.C. § 1983 in the civil context.

CONCLUSION

For all the foregoing reasons, the petitioners submit that where a parolee voluntarily agrees to submit to suspicionless searches – or where an individual is subject to a valid outstanding arrest warrant – the individual has no existing, legitimate, subjective or objective expectation of remaining free from police intrusions, so long as the search is accomplished in a reasonable manner. Accordingly, this Court should grant this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit and should hold that neither reasonable suspicion nor police foreknowledge of a search condition or an arrest warrant is required for otherwise reasonable police intrusions, since the individual has no legitimate expectation to remain free from such detentions, searches, or arrests.

Respectfully submitted,

MANNING & MARDER,
KASS, ELLROD, RAMIREZ LLP

SCOTT WM. DAVENPORT*

Attorneys for Petitioners,
Sheriff Leroy Baca, Deputy
Sheriff Sean Banks and
Deputy Sheriff Thomas Garcia

**Counsel of Record*

431 F.3d 633

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. MORENO, in his individual capacity and in his capacity as representative of the classes described fully herein,
Plaintiff-Appellee,

v.

LEROY BACA; MICHAEL ANTONOVICH; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; ZEV YAROSLAVSKY,
Defendants,

and

BANKS, Deputy Sheriff #403862; GARCIA, Deputy Sheriff #412525,
Defendants-Appellants,

STATE OF CALIFORNIA,
Intervenor-on-Appeal.

No. 02-55627

D.C. No.
CV 00-07149 ABC
ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
April 9, 2003 – Pasadena, California
Submission Withdrawn October 8, 2003
Resubmitted February 16, 2005

Opinion Filed March 7, 2005
Opinion Withdrawn and Amended Opinion
Filed December 9, 2005

Before: Harry Pregerson, A. Wallace Tashima, and
Richard R. Clifton, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

Devallis Rutledge, Manning & Marder Kass, Ellrod, Ramirez, Irvine, California, for the defendants-appellant.

Kathryn S. Bloomfield, Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, California, for the plaintiff-appellee.

Doris A. Calandra, Deputy Attorney General, Sacramento, California, for the intervenor-on-appeal.

ORDER

The Opinion and separate Opinion concurring in the judgment filed on March 7, 2005, slip op. 2657 and 2687, and reported at 400 F.3d 1152 and 1169, are withdrawn and replaced by the Amended Opinion filed concurrently with this order.

The foregoing action renders defendants-appellants' petition for rehearing and petition for rehearing en banc, and intervenor-on-appeal State of California's petition for rehearing and/or petition for rehearing en banc moot. Subsequent petitions for panel rehearing and/or petitions for rehearing en banc may be filed with respect to the Amended Opinion in accordance with the requirements of Fed. R. App. P. 40 and 35.

OPINION

TASHIMA, Circuit Judge:

Los Angeles County Deputy Sheriffs Sean Banks and Thomas Garcia ("Appellants") appeal from the district

court's denial of their motion for summary judgment asserting qualified immunity in a § 1983 action brought by plaintiff Richard Moreno. Moreno alleges that Appellants, acting under color of state law, deprived him of his constitutional rights when they arrested and searched him without cause. We affirm.

Factual Background

One evening in January 2000, Richard Moreno and his companion Joe Rodriguez were on their way to a meeting at St. Lucy's Church in the City Terrace area of Los Angeles. After their car broke down, Moreno and Rodriguez proceeded toward the meeting on foot. At approximately 7 p.m., a marked Los Angeles County Sheriff patrol car passed them as they walked down the street, made a U-turn, and pulled the car onto the curb in their path. Two deputies got out of the car. Deputy Banks, who was riding in the passenger seat, ordered Moreno and Rodriguez to approach. Banks interrogated both men as to their business in the area, patted them down for weapons, emptied the contents of their pockets onto the hood of the patrol car, and locked them into the back seat. While Moreno and Rodriguez sat in the back seat of the car, Deputy Banks entered their names into a computer inside the patrol ear and asked the men whether they were on parole. Moreno admitted that he was.

Meanwhile, Deputy Garcia, the driver of the patrol car, walked down the sidewalk in the direction from which Rodriguez and Moreno had approached, shining his flashlight on the sidewalk and into nearby yards as he went. When Garcia returned to the patrol car he had a discussion with Banks, reached into the glove compartment to retrieve

a ziploc bag, and then put the bag back into the glove compartment and closed the door. Moreno heard one of the deputies tell the other that Rodriguez was "clean" but that Moreno was on parole. At that point, Garcia opened the rear door of the car and told Rodriguez that he was free to leave, which he did. Moreno was handcuffed and told that he was under arrest for violating his parole. When Moreno asked the deputies what he had done to violate his parole, one of them told him that he was caught in possession of rock cocaine.

Deputies Banks and Garcia gave a somewhat different account of the incident. According to their incident report, Banks noticed that Moreno was "startled" when he saw the patrol car. As the deputies approached, Moreno turned around, reached into his right front pants pocket, and discarded something on the front steps of a nearby residence. Because the deputies were on patrol in a high crime area, and because they were aware that drugs were sold in several houses nearby, they decided to investigate. They detained Moreno and placed him in the patrol car. Banks walked to the area in which he had seen Moreno discard the object and recovered an object he recognized as rock cocaine. One of the deputies did a warrant check on the patrol car's MDT terminal, which revealed an outstanding arrest warrant with $10,000 bail for Moreno.[1] The MDT search also revealed that Moreno was on parole, a fact which Moreno orally confirmed. Both deputies declared under oath that they were aware from their training and

[1] An MDT terminal gives deputy sheriffs access to certain criminal records, and can alert officers to the possibility of outstanding arrest warrants.

experience that a standard term of parole was that parolees were subject to warrantless searches by any peace officer. Moreno was placed under arrest, both for possession of cocaine and under the authority of the outstanding arrest warrant, and a parole hold was placed on him. Although the incident report makes no reference to Rodriguez or any other person, both Banks and Garcia refer to "another man" in their sworn declarations describing the encounter.

At the time of the detention, Moreno was indeed a parolee under the supervision of the California Department of Corrections. He had been released from prison more than two years earlier, subject to the following condition: "You and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer." Moreno also had an outstanding arrest warrant, which was issued when Moreno failed to make an appearance in state court in 1999. It is undisputed, however, that the deputies learned that Moreno was on parole and that he had an outstanding arrest warrant only after searching and detaining him.

Moreno was subsequently charged in state court with possession of a controlled substance. Deputies Banks and Garcia testified against him at trial and Rodriguez testified for the defense. Moreno was acquitted by a jury in 2002.

Moreno then brought this action under 42 U.S.C. § 1983, contending that Banks and Garcia violated his Fourth Amendment right to be free from unreasonable searches and seizures when they arrested and searched him without cause. Banks and Garcia responded that

Moreno had no right to be free from suspicionless arrests and searches because of the out-standing bench warrant and the parole condition, Even if reasonable suspicion were required to detain Moreno, the officers contended, they had the requisite level of suspicion because of Moreno's nervous behavior and the fact that he was walking in a "high crime" area.

The district court sided with Moreno, reasoning that under *Griffin v. Wisconsin,* 483 U.S. 868 (1987), and *United States v. Knights,* 534 U.S. 112 (2001), "at least reasonable suspicion is required to justify the search, and subsequent seizure, of Moreno." The court further held that, interpreting the facts in the light most favorable to Moreno, the facts "do not come close to the level of suspicion that existed in *Knights* and *Griffin.*" It rejected the deputies' argument that Moreno's parole search condition and the outstanding arrest warrant retroactively justified the arrest and search even though neither Banks nor Garcia was aware of either circumstance at the time. The court denied the deputies' motion for summary judgment on qualified immunity grounds, holding that Moreno's constitutional right to be free from suspicionless searches was "clearly established" at the time of the detention, and that a suspect's nervousness at the sight of law enforcement, by itself, did not give rise to reasonable suspicion.

The deputies brought this interlocutory appeal of the district court's denial of summary judgment on qualified immunity grounds. We have jurisdiction over the appeal, but only to the extent that it presents legal questions. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985); *Jeffers v. Gomez,* 267 F.3d 895, 903 (9th Cir. 2001) ("Our jurisdiction [to review the denial of qualified immunity] generally is limited to questions of law and does not extend to claims

in which the determination of qualified immunity depends on disputed issues of material fact.").

I

We review the district court's denial of a motion for summary judgment de novo *Billington v. Smith,* 292 F.3d 1177, 1183 (9th Cir. 2002). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Oliver v. Keller,* 289 F.3d 623, 626 (9th Cir. 2002). "[T]he ordinary framework for deciding motions for summary judgment" applies to motions for summary judgment based on official immunity. *Butler v. San Diego Dist. Attorney's Office,* 370 F.3d 956, 963 (9th Cir. 2004). Because the moving defendant bears the burden of proof on the issue of qualified immunity, he or she must produce sufficient evidence to require the plaintiff to go beyond his or her pleadings. *Id.* The defendant's burden is to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

The determination of whether a law enforcement officer is entitled to qualified immunity involves a two-step analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In the first step we must view the record in the light most favorable to the party asserting injury in determining whether the officer's conduct violated a constitutional right. *Id.* If the plaintiff establishes the violation of a constitutional right, we must next consider whether that right was clearly established at the time the alleged violation occurred. *Id.* The contours of the right must have

been clear enough that a reasonable officer would have understood that what he or she was doing violated that right. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

We may affirm the district court on any basis supported by the record. *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.,* 159 F.3d 412, 418 (9th Cir. 1998).

II

Appellants first contend that Moreno had no Fourth Amendment rights that could have been violated by virtue of the parole condition allowing warrantless searches of his person, residence, and property. Second, they contend that the arrest and search were justified by the parole search condition and the outstanding arrest warrant, despite the fact that the deputies did not know of either fact at the time. Because we reject the second contention, we need not reach the first.

A. Did the Existence of Either the Parole Condition or the Outstanding Bench Warrant Retroactively Justify the Arrest and Search?

Appellants argue that the search was reasonable under the Fourth Amendment because Moreno was on parole and because there was an outstanding misdemeanor warrant for Moreno's arrest. First, we assume without deciding that the conditions under which Moreno was stopped, searched, and detained were such as to justify a parole search and detention, had the officers known that Moreno was on parole before acting. Second, we also assume that the existence of an arrest warrant could have rendered Moreno's arrest "reasonable" and that a search incident to lawful arrest would have been permissible under *United*

States v. Robinson, 414 U.S. 218, 235 (1973). It is undisputed, however, that Deputies Banks and Garcia were not aware of Moreno's parole status or of the outstanding arrest warrant at the time of the seizure. Thus, we must confront the question of whether a search or seizure can be considered "reasonable" if the facts that rendered the search "reasonable" (in this case, the parole status and outstanding arrest warrant) were unknown to the officer at the time of the intrusion. We hold that it cannot.

It is well established that under the Fourth Amendment, to arrest a suspect on probable cause, the "facts and circumstances within the officer's knowledge [must be] sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott v. United States*, 436 U.S. 128, 137 (1978); *see also Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("We have described reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity, and probable cause to search as existing where the *known facts and circumstances* are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.") (emphasis added) (citation omitted); *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (holding that "factual determinations bearing upon search and

seizure" must be judged against an "objective standard" based on "facts available to the officer at the moment").[2]

In *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (per curiam), we held that a police officer's knowledge that a man was subject to an outstanding bench warrant, which he acquired only after unlawfully seizing the man, did not retroactively render the seizure of that man "reasonable" under the Fourth Amendment. *Id.* at 90-91. In that case, the officer spotted a man jaywalking and summoned him to his police car. After reviewing the man's identification, the officer detained the man long enough to write a jaywalking citation. We held that the temporary seizure during which the police checked the man's identification and wrote the citation was reasonable under the Fourth Amendment because it was "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 90 (quoting *Terry*, 392 U.S. at 16, 19). But the officer continued to detain the man after the citation was written for the sole purpose of running a warrant check on him. The warrant

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[2] *See also Thacker v. City of Columbus*, 328 F.3d 244, 261 (6th Cir. 2003); *United States v. Castro*, 166 F.3d 728, 733 (5th Cir. 1999) ("Probable cause exists when the totality of facts and circumstances within a police officer's knowledge *at the moment of arrest* are sufficient for a reasonable person to conclude that the suspect had committed, or was in the process of committing, an offense.") (emphasis added); *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996) ("In assessing the existence of probable cause, courts examine the totality of the circumstances known to the officer *at the time of the arrest*") (emphasis added). Indeed, in addressing the converse situation, in which law enforcement officers arrested a man because they reasonably believed that an outstanding arrest warrant existed when in fact it did not, the Supreme Court found that the seizure was "reasonable" (for the purpose of applying the "good faith" exception to the exclusionary rule) precisely because it was justified based on the facts known to the officers at the time. *United States v. Leon*, 468 U.S. 897, 926 (1984).

check turned out positive, and the officer arrested him on that basis. A search incident to that arrest revealed a package of counterfeit money orders. We held that the detention of the man for the purpose of running the warrant check was "unreasonable," and the evidence was properly suppressed at trial, because at the time it was conducted, the officer "had no reasonable grounds to be suspicious that there might be a warrant outstanding against him." *Id.* at 91; *see also United States v. Johnson,* 256 F.3d 895, 903 (9th Cir. 2001) (en banc) (Ferguson, J., joined by Schroeder, Pregerson, and Paez, JJ.) ("We have never held that an officer lacking any prior objective knowledge of the use of an out-building may approach it free of Fourth Amendment constraints."); *United States v. DiCesare,* 765 F.2d 890, 899 (9th Cir. 1985) ("[T]he acquisition of probable cause during an unlawful seizure does not cure the illegality and does not constitute an independent source of probable cause."), *amended* by 777 F.2d 543 (9th Cir. 1985).

Appellants cite to *Whren v. United States,* 517 U.S. 806 (1996), for the proposition that the underlying intent or motivation of the police is irrelevant for Fourth Amendment search and seizure purposes. *Id.* at 813. But *Whren* held only that the illegitimate subjective motivation of a police officer will not invalidate an *otherwise constitutional seizure* that is "objectively justifiable" based on facts known to the officer. *Id.*; *see also United States v. Cervantes,* 219 F.3d 882, 890 (9th Cir. 2000) ("It is important to remember that the foundation of the Court's position in *Whren* is that 'where the search or seizure is based upon probable cause' there is with rare exception no balancing to be done or reasonableness determination to be made because the probable cause itself serves as the

exclusive 'measure of the lawfulness of enforcement.'") (quoting Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.4 (3d ed. 1996) (footnote omitted)); *United States v. Wallace,* 213 F.3d 1216, 1219 (9th Cir. 2000) ("The fact that the alleged traffic violation is a pretext for the stop is irrelevant, so long as the objective circumstances justify the stop."). In other words, although *Whren* stands for the proposition that a pretextual seizure based on the illegitimate subjective intentions of an officer may be permissible, it does not alter the fact that the pretext itself must be a constitutionally sufficient basis for the seizure and the facts supporting it must be known at the time it is conducted. *Whren*, 517 U.S. at 813. In this case, as in *Luckett,* it is undisputed that Appellants were not aware of the fact that Moreno was subject to an outstanding arrest warrant at the time they arrested him. Therefore, there are no facts from which we can conclude that the suspicionless arrest and search in this case were objectively justifiable.

Appellants' reliance on cases dealing with one's "standing" to bring a Fourth Amendment challenge, *Minnesota v. Carter*, 525 U.S. 83 (1998), *United States v. Padilla*, 508 U.S. 77 (1993), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), is likewise unavailing. In each of those cases, there was a question as to whether the person challenging the search had standing because he or she lacked a legitimate expectation of privacy in the place searched or the thing seized. *See Carter*, 525 U.S. at 91 (holding that respondent lacked standing to bring Fourth Amendment challenge based on police search of another person's home because respondent had no expectation of privacy therein); *Padilla,* 508 U.S. at 81-82 (remanding for factual determination as to whether petitioner had a

legitimate privacy interest in a seized automobile in which he had no ownership interest and was not a passenger); *Rawlings,* 448 U.S. at 105-06 (holding that petitioner could not challenge the search of another person's purse because he lacked a reasonable expectation of privacy therein). By contrast, there is no question that Moreno had standing to challenge the search and seizure of his own person. *See Terry*, 392 U.S. at 9 ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.") (quoting *Union Pac. Ry. v. Botsford,* 141 U.S. 250, 251 (1891)).

All that we have said above with respect to the necessity that the officers know of the existence of a warrant before they can make an arrest pursuant to that warrant applies with equal force to a parole condition – an officer must know of a detainee's parole status before that person can be detained and searched pursuant to a parole condition. In fact, the California Supreme Court has recently so held. *People v. Sanders,* 93 P.3d 496, 505 (Cal. 2003) (holding that the "police cannot justify an otherwise unlawful search of a residence because, unbeknownst to the police, a resident of the dwelling was on parole and subject to a search condition").

For all of these reasons, we hold that police officers cannot retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole condition.

B. Were the Constitutional Rights at Issue Clearly Established?

Having established that Appellants violated Moreno's constitutional rights when they conducted the suspicionless search and seizure, we must evaluate whether those rights were clearly established at the time of the incident and whether the "unlawfulness [of Appellants' conduct] was apparent in light of preexisting law." *Malik v. Brown,* 71 F.3d 724, 727 (9th Cir. 1995).

> It is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of defendants' actions] was apparent in light of preexisting law. Closely analogous preexisting case law is not required to show that a right was clearly established. In other words, while there may be no published cases holding similar policies constitutional, this may be due more to the obviousness of the illegality than the novelty of the legal issue.

Sorrels v. McKee, 290 F.3d 965, 970 (9th Cir. 2002). "[W]hen an officer's conduct 'is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.'" *Boyd v. Benton County,* 374 F.3d 773, 781 (9th Cir. 2004) (quoting *Deorle v. Rutherford,* 272 F.3d 1272, 1286 (9th Cir. 2001)).

Deputies Banks and Garcia detained and searched Moreno based on his nervous behavior when he spotted

the patrol car in an area known for high crime.[3] They contend that their actions were justified (1) because, as a result of Moreno's parole status and his outstanding arrest warrant, no level of suspicion was required in order to arrest and search him, and (2) even if reasonable suspicion was required to search Moreno, the officers had reasonable suspicion based on Moreno's nervous behavior in a high crime area. Both contentions are untenable.

Appellants' first argument in favor of qualified immunity – that it was not clearly established that Moreno had any right to be free from suspicionless searches because of his parole status and his outstanding arrest warrant – relies on the two alternate assertions discussed above, both of which must fail. When evaluating whether a law enforcement officer was on notice that his conduct was unlawful in a particular instance, we look only to the "circumstances presented to [the] officer." *Saucier,* 533 U.S. at 209. The "relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Id.* at 202 (emphasis added).

Appellants' first assertion – that the parole search condition stripped Moreno of "a normal scope of Fourth Amendment protection" – does not justify the suspicionless search and seizure. While Moreno's parole status may have rendered it unclear what level of suspicion was required to conduct such a warrantless search, if Appellants had known of the parole condition at the time of the

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[3] Because we view the facts in the light most favorable to the nonmoving party, we do not consider the officers' contention, which Moreno denies, that Moreno removed an object from his pocket and placed it on the ground.

search and seizure, it is uncontested that this fact was unknown to Appellants at the time of their actions and was not a fact on which Appellants relied. Because the Deputies did not know of Moreno's parole status and his outstanding arrest warrant at the time they searched and seized him, those circumstances cannot justify their conduct. At the time of the incident in this case, it was clearly established that the facts upon which the reasonableness of a search or seizure depends, whether it be an outstanding arrest warrant, a parole condition, or any other fact, must be known to the officer at the time the search or seizure is conducted. *Rodriguez*, 497 U.S. at 188; *Luckett*, 484 F.2d at 90-91.

Appellants' other argument – that the officers reasonably believed that the facts known to them constituted "reasonable suspicion" – is also unpersuasive. It was well-established at the time of Moreno's detention that nervousness in a high crime area, without more, did not create reasonable suspicion to detain an individual. In *Chavez-Valenzuela*, 268 F.3d at 725, we noted that although the Ninth Circuit had not yet ruled on whether nervousness alone constitutes reasonable suspicion, the Sixth, Seventh, and Eleventh Circuit had concluded (prior to 2000) that appearing nervous is only one of several factors for finding reasonable suspicion. *See United States v. Hill*, 195 F.3d 258, 272 (6th Cir. 1999); *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1996). We also noted that "no circuit has held that nervousness alone suffices to create reasonable suspicion." *Chavez-Valenzuela*, 268 F.3d at 726; *see also Brown v. Texas*, 443 U.S. 47, 52 (1979) (holding that officers did not have reasonable suspicion for an investigatory stop when they detained two men who were walking away from

each other in an alley in an area known for drug trafficking because "the . . . activity was no different from the activity of other pedestrians in that neighborhood"). The Supreme Court has held that in some circumstances an individual's flight from law enforcement in a high crime area can justify an investigatory seizure. *Illinois v. Wardlow,* 528 U.S. 119, 125 (2000). But Moreno's simple act of walking away from the officers could not have been reasonably mistaken for the type of "flight" the officers confronted in *Wardlow. See United States v. Valentine*, 232 F.3d 350, 357 (3d Cir. 2000) ("Walking away from the police hardly amounts to the headlong flight considered in *Wardlow* and of course would not give rise to reasonable suspicion by itself, even in a high-crime area[.]"). Interpreting all disputed issues of fact in favor of Moreno, as we must, we hold that no reasonable officer could have concluded that the circumstances confronted by Appellants in this case gave rise to "reasonable suspicion."

CONCLUSION

For the foregoing reasons, we affirm the district court's denial of qualified immunity and remand for further proceedings.

AFFIRMED and REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. MORENO, in his individual capacity and in his capacity as representative of the classes described fully herein, Plaintiff-Appellee, STATE OF CALIFORNIA, Intervenor, v. LEROY BACA; et al., Defendants, and BANKS, Deputy Sheriff #403862; et al., Defendants-Appellants.	No. 02-55627 D.C. No. CV-00-07149-ABC **JUDGMENT**

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED, REMANDED.**

Filed and entered 12/09/05

400 F.3d 1152

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. Moreno, in his individual capacity and in his capacity as representative of the classes described fully herein,

Plaintiff-Appellee,

v.

Leroy Baca; Michael Antonovich; Yvonne Burke; Donald Knabe; Gloria Molina; Zev Yaroslavsky,

Defendants,

and

Banks, Deputy Sheriff # 403862; Garcia, Deputy Sheriff # 412525,

Defendants-Appellants.

No. 02-55627

D.C. No.
CV 00-07149 ABC
OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
April 9, 2003 – Pasadena, California
Submission withdrawn October 8, 2003
Resubmitted February 16, 2005

Filed March 7, 2005

Before: Harry Pregerson, A. Wallace Tashima, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Tashima;
Concurrence by Judge Clifton

COUNSEL

Devallis Rutledge, Manning & Marder Kass, Ellrod, Ramirez, Irvine, California, for defendants-appellants.

Kathryn S. Bloomfield, Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, California, for plaintiff-appellee.

OPINION

TASHIMA, Circuit Judge:

Los Angeles County Deputy Sheriffs Sean Banks and Thomas Garcia ("Appellants") appeal from the district court's denial of their motion for summary judgment asserting qualified immunity in a § 1983 action brought by plaintiff Richard Moreno. Moreno alleges that Appellants, acting under color of state law, deprived him of his constitutional rights when they arrested and searched him without cause.

Factual Background

One evening in January 2000, Richard Moreno and his companion Joe Rodriguez were on their way to a meeting at St. Lucy's Church in the City Terrace area of Los Angeles. After their car broke down, Moreno and Rodriguez proceeded toward the meeting on foot. At approximately 7 p.m., a marked Los Angeles County Sheriff patrol car passed them as they walked down the street, made a U-turn, and pulled the car onto the curb in their path. Two deputies got out of the car. Deputy Banks, who was riding in the passenger seat, ordered Moreno and Rodriguez to approach. Banks interrogated both men as to

their business in the area, patted them down for weapons, emptied the contents of their pockets onto the hood of the patrol car, and locked them into the back seat. While Moreno and Rodriguez sat in the back seat of the car, Deputy Banks entered their names into a computer inside the patrol car and asked the men whether they were on parole. Moreno admitted that he was.

Meanwhile, Deputy Garcia, the driver of the patrol car, walked down the sidewalk in the direction from which Rodriguez and Moreno had approached, shining his flashlight on the sidewalk and into nearby yards as he went. When Garcia returned to the patrol car he had a discussion with Banks, reached into the glove compartment to retrieve a ziploc bag, and then put the bag back into the glove compartment and closed the door. Moreno heard one of the deputies tell the other that Rodriguez was "clean" but that Moreno was on parole. At that point, Garcia opened the rear door of the car and told Rodriguez that he was free to leave, which he did. Moreno was handcuffed and told that he was under arrest for violating his parole. When Moreno asked the deputies what he had done to violate his parole, one of them told him that he was caught in possession of rock cocaine.

Deputies Banks and Garcia gave a somewhat different account of the incident. According to their incident report, Banks noticed that Moreno was "startled" when he saw the patrol car. As the deputies approached, Moreno turned around, reached into his right front pants pocket, and discarded something on the front steps of a nearby residence. Because the deputies were on patrol in a high crime area, and because they were aware that drugs were sold in several houses nearby, they decided to investigate. They detained Moreno and placed him in the patrol car. Banks

walked to the area in which he had seen Moreno discard the object and recovered an object he recognized as rock cocaine. One of the deputies did a warrant check on the patrol car's MDT terminal, which revealed an outstanding arrest warrant with $10,000 bail for Moreno.[1] The MDT search also revealed that Moreno was on parole, a fact which Moreno orally confirmed. Both deputies declared under oath that they were aware from their training and experience that a standard term of parole was that parolees were subject to warrantless searches by any peace officer. Moreno was placed under arrest, both for possession of cocaine and under the authority of the outstanding arrest warrant, and a parole hold was placed on him. Although the incident report makes no reference to Rodriguez or any other person, both Banks and Garcia refer to "another man" in their sworn declarations describing the encounter.

At the time of the detention, Moreno was indeed a parolee under the supervision of the California Department of Corrections. He had been released from prison more than two years earlier, subject to the following condition: "You and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer." As it turns out, Moreno also had an outstanding arrest warrant, which was issued when Moreno failed to make an appearance in state court in 1999. It is undisputed, however, that the deputies learned that Moreno was on parole

[1] An MDT terminal gives deputy sheriffs access to certain criminal records, and can alert officers to the possibility of outstanding arrest warrants.

and that he had an outstanding arrest warrant only after searching and detaining him.

Moreno was subsequently charged in state court with possession of a controlled substance. Deputies Banks and Garcia testified against him at trial and Rodriguez testified for the defense. Moreno was acquitted by a jury in 2002.

Moreno then brought this action under 42 U.S.C. § 1983, contending that Banks and Garcia violated his Fourth Amendment right to be free from unreasonable searches and seizures when they arrested and searched him without cause. Banks and Garcia responded that Moreno had no right to be free from suspicionless arrests and searches because of the outstanding bench warrant and the parole condition. Even if reasonable suspicion were required to detain Moreno, the officers contended, they had the requisite level of suspicion because of Moreno's nervous behavior and the fact that he was walking in a "high crime" area. The district court sided with Moreno, reasoning that under *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and *United States v. Knights*, 534 U.S. 112 (2001), "at least reasonable suspicion is required to justify the search, and subsequent seizure, of Moreno." The court further held that, interpreting the facts in the light most favorable to Moreno, the facts "do not come close to the level of suspicion that existed in *Knights* and *Griffin*." It rejected the deputies' argument that Moreno's parole search condition and the outstanding arrest warrant retroactively justified the arrest and search even though neither Banks nor Garcia was aware of either circumstance at the time. The court denied the deputies' motion for summary judgment on qualified immunity grounds, holding that Moreno's constitutional right to be

free from suspicionless searches was "clearly established" at the time of the detention, and that a suspect's nervousness at the sight of law enforcement, by itself, did not give rise to reasonable suspicion.

The deputies brought this interlocutory appeal of the district court's denial of summary judgment on qualified immunity grounds. We have jurisdiction over the appeal, but only to the extent that it presents legal questions. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) ("Our jurisdiction [to review the denial of qualified immunity] generally is limited to questions of law and does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact.").

I.

We review the district court's denial of a motion for summary judgment de novo. *Billington v. Smith*, 292 F.3d 1177, 1183 (9th Cir. 2002). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002). "[T]he ordinary framework for deciding motions for summary judgment" applies to motions for summary judgment based on official immunity. *Butler v. San Diego Dist. Attorney's Office*, 370 F.3d 956, 963 (9th Cir. 2004). Because the moving defendant bears the burden of proof on the issue of qualified immunity, he or she must produce sufficient evidence to require the plaintiff to go beyond his or her pleadings. *Id.* The defendant's burden is to demonstrate the absence of a

genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The determination of whether a law enforcement officer is entitled to qualified immunity involves a two-step analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In the first step we must view the record in the light most favorable to the party asserting injury in determining whether the officer's conduct violated a constitutional right. *Id.* If the plaintiff establishes the violation of a constitutional right, we must next consider whether that right was clearly established at the time the alleged violation occurred. *Id.* The contours of the right must have been clear enough that a reasonable officer would have understood that what he or she was doing violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

II

Appellants challenge the district court's order on two fronts. Their primary contention is that Moreno had no Fourth Amendment rights that could have been violated by virtue of the parole condition allowing warrantless searches of his person, residence, and property. They further assert that the arrest and search were justified by the parole search condition and the outstanding arrest warrant, despite the fact that the deputies did not know of either fact at the time. We reject both these contentions.

A. Did the Suspicionless Detention Violate Moreno's Fourth Amendment Right to Be Free From Unreasonable Searches and Seizures?

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The "touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citations omitted). The "reasonableness" mandated by the Fourth Amendment generally requires law enforcement officers to obtain a warrant supported by probable cause prior to conducting a search. *Payton v. New York*, 445 U.S. 573, 586 (1980). When applied in circumstances that make the warrant requirement impracticable, however, the "reasonableness" standard can be met even in the absence of a warrant. *Warden v. Hayden*, 387 U.S. 294, 298 (1967). And, in extraordinary situations in which the government has a "special need, beyond ordinary law enforcement," the reasonableness standard can be met even in the absence of probable cause. *New Jersey v. T.L.O.*, 469 U.S. 325, 347 (1985).

But the doctrines that the Court has crafted to respond to these unique situations are merely a gloss on the reasonableness standard embodied in the text of the Fourth Amendment itself. In the absence of controlling case law, our central inquiry in Fourth Amendment search and seizure cases remains whether the search or seizure was reasonable in light of "all the circumstances surrounding the encounter." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). We applied the "reasonableness" test to evaluate the warrantless search of a parolee in *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975) (en banc). *See id.* at 248-49 (holding that "[parole] searches may be held illegal and

the evidence obtained therefrom suppressed unless they pass muster under the Fourth Amendment test of reasonableness").[2] In evaluating whether the suspicionless search and seizure of Moreno was "reasonable," we balance "the degree to which the intrusion intrudes upon an individual's privacy" against "the degree to which it is needed for the promotion of legitimate governmental interests."[3] *Knights*, 534 U.S. at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

1. *The Privacy Interests of Parolees*

We begin our analysis by rejecting Appellants' contention that Moreno, by the very nature of his status as a parolee, had no Fourth Amendment rights at all. We

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[2] More recently, in *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc), *petition for cert. filed*, (U.S. Nov. 15, 2004) (No. 04-7253), we were unable to resolve the proper test to be applied to determine whether an involuntary blood draw from a supervised releasee for a DNA databank violated the Fourth Amendment. *See id.* at 842 n.1 (Reinhardt, J., dissenting).

[3] Because the arrest and search at issue in this case were clearly for law enforcement purposes, the "special needs" doctrine does not apply. *See Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.20 (2001) ("In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes."); *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000) (observing that the "special needs" doctrine has never been applied where the purpose of the search was "to detect evidence of ordinary criminal wrongdoing"); *see also Kincade*, 379 F.3d at 854 (Reinhardt, J., dissenting) ("Never in over two hundred years of history has the Supreme Court approved of a suspicionless search designed to produce ordinary evidence of criminal wrongdoing for use by the police."). Even assuming that parole supervision can qualify as a "special need," Appellants cannot reasonably contend that the search was conducted for the purpose of supervising parolees, *see Griffin*, 483 U.S. at 873, because they did not know that Moreno was a parolee at the time of the incident.

rejected an identical argument three decades ago in *Latta*. *See Latta*, 521 F.2d at 248 ("It is . . . too late in the day to assert that searches of parolees by their parole officers present no Fourth Amendment issues."). The Fourth Amendment by its explicit terms applies to all persons, regardless of their status under the law.

In *Griffin*, the Supreme Court confronted the question of whether and to what extent the Fourth Amendment limits the government's ability to search probationers, who, like parolees, are offered conditional liberty as an alternative to incarceration. A Wisconsin regulation permitted any probation officer to search a probationer's home without a warrant so long as there were "reasonable grounds" to believe that contraband would be found. 483 U.S. at 871. Acting in response to a tip that the probationer kept guns in his apartment, but without a warrant, a probation officer searched Griffin's home and recovered a gun there. The probationer moved to suppress the gun in a subsequent felony trial in state court, but the motion was denied. The Supreme Court affirmed, holding that the "reasonable grounds" standard satisfied the Fourth Amendment's "reasonableness" requirement. *Id.* at 873. The Court began by recognizing that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable." *Id.* Although the Court acknowledged that a search of a home must generally be authorized by a warrant supported by probable cause, it reasoned that Wisconsin's interest in supervising its probationers constituted a "special need" beyond ordinary law enforcement, *see T.L.O.*, 469 U.S. at 351, which permitted a "degree of impingement on privacy that would not be constitutional if applied to the public at large." 483 U.S. at 875.

> Probation is simply one point (or more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum security facility to a few hours of mandatory community service. A number of different options lie between those extremes, including confinement in a medium- or minimum-security facility, work release programs, "halfway houses," and probation – which itself can be more or less confining depending on the number and severity of restrictions imposed. . . . To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy the "absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions."

Id. at 874, 107 S.Ct. 3164 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)) (statutory citation omitted) (first ellipsis added; other alterations in the original).

The Court recently reaffirmed the principle that probation "significantly diminish[es]," but does not extinguish, an individual's reasonable expectation of privacy. *Knights*, 534 U.S. at 119, 122 S.Ct. 587. In *Knights*, a probationer had explicitly agreed to submit his person and property to a search "at anytime, with or without a search warrant, warrant of arrest, or reasonable cause" as a condition of his release. *Id.* at 114. The probationer and his colleague were suspected of having vandalized several Pacific Gas and Electric ("PG & E") facilities in connection with an ongoing dispute between Knights and the company over theft of services. A detective assigned to investigate noticed that acts of vandalism tended to coincide with the probationer's court dates in the theft-of-services

dispute, and decided to place the probationer's home under surveillance. In the bed of a truck parked in the petitioner's driveway, he saw a gasoline can, a molotov cocktail, and brass padlocks matching the description of padlocks pried from a vandalized PG & E transformer vault. At one point he observed the probationer's colleague walk out of the house with what appeared to be pipe bombs. Knowing that the probationer was subject to the condition that his property may be searched without cause, the officer conducted a warrantless search of Knight's home.

The probationer successfully moved to suppress the evidence on Fourth Amendment grounds, and we affirmed, but the Supreme Court reversed. The Court concluded that the search "was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances.'" *Id.* at 118 (quoting *Robinette*, 519 U.S. at 39). The Court reasoned that the probationer's agreement to submit to suspicionless searches "significantly diminished [his] reasonable expectation of privacy" and that the state had a significant interest in supervising probationers, who were more likely than ordinary citizens to violate the law. *Id.* at 119-21. Nonetheless, the Court still held that reasonable suspicion was required to search the probationer's house, stating that a "lesser than probable-cause standard" satisfied the Fourth Amendment "when the balance of governmental and private interests makes such a standard reasonable." *Id.* at 121. Relying on the fact that the detective had a "reasonable suspicion" that evidence of the PG & E crimes would be found, the court held that the search did not violate the Fourth Amendment because there was "enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *Id.*

Because of the similarity of their relationship vis-a-vis the government, we have treated parolees and probationers essentially the same for the purpose of Fourth Amendment analysis. *See Kincade*, 379 F.3d at 817 n.2 ("Our cases have not distinguished between parolees, probationers, and supervised releasees for Fourth Amendment purposes."); *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) ("We do not believe the distinction between the status of parolee and that of a probationer is constitutionally significant for purposes of evaluating the scope of a search."); *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991) ("Nor do we see a constitutional difference between probation and parole for purposes of the fourth amendment."). Like probationers, parolees are entitled to "conditional liberty properly dependent on observance of special . . . restrictions." *Morrissey*, 408 U.S. at 480; *see also Penn. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 365 (1998) (describing parole as a condition in which "the State accords a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release"). Whereas a probationer's release is premised on the idea that he or she can serve a meaningful sentence without being incarcerated, a parolee's release is designed to provide a transition period between incarceration and complete freedom. But, in either case, some degree of privacy and autonomy is inherent in the offender's status.

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is

> free to be with family and friends and to form the other enduring attachments of normal life.

Morrissey, 408 U.S. at 480; *see also Latta*, 521 F.2d at 250 (holding that "the parolee's interest in maintaining his personal privacy, even as against his parole officer, is in many respects like that of other citizens"). Thus, the condition of a parolee is "very different from that of confinement in a prison," and it "includes many of the core values of unqualified liberty." *Morrissey*, 408 U.S. at 480.

The conditions of Moreno's parole are only marginally relevant to our analysis. At most, the parole agreement is a "salient circumstance" which we must weigh in determining whether the search and seizure in this case was reasonable. *Knights*, 534 U.S. at 118. In *Knights*, the court held that the offender's probation condition, in which he agreed to submit to suspicionless searches, "significantly diminished [his] reasonable expectation of privacy" because the "probation order clearly expressed the search condition and [he] was unambiguously informed of it." *Id.* at 120. In this case, by contrast, although Moreno's parole agreement provides that officers may conduct a *warrantless* search and seizure of his person, it does not permit officers to conduct a *suspicionless* arrest and seizure.[4] Random searches not premised on individualized

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[4] Similarly, in *United States v. Crawford*, 372 F.3d 1048 (9th Cir.2004) (en banc), *cert. denied*, 543 U.S. 1057, 125 S.Ct. 863, 160 L.Ed.2d 783 (2005), in which we assumed without deciding that a search of a parolee violated the Fourth Amendment, *id.* at 1054, the parole document provided for "search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant, *and with or without cause*," *id.* at 1051 (emphasis added).

suspicion are not contemplated by the parole conditions.[5] *Cf. Rowe v. Lamb*, 130 F.3d 812, 814 (8th Cir. 1997) (holding that a warrantless search of a probationer's home was reasonable where the probationer agreed as a term of his probation to be subject to warrantless searches with or without probable cause). Moreno cannot be accused of manifesting a subjective expectation that he would be vulnerable to suspicionless searches simply because he signed the parole agreement. And his agreement to submit to *warrantless* searches cannot be said to reduce his privacy rights so severely as to make a *suspicionless* search reasonable.

2. *The Degree of the Intrusion*

Having clarified that parolees are entitled to the protection of the Fourth Amendment, we must decide the extent to which the Fourth Amendment protected Moreno from the intrusion in this case. In doing so, we weigh the intrusiveness of the search and seizure taking into account the context in which they occurred, because the "specific content and incidents" of Moreno's right to privacy depend on "the context in which it is asserted." *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

Whatever the extent of Moreno's Fourth Amendment rights, they clearly included the right to walk along a public sidewalk unmolested by law enforcement.

> Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion, to go where one

[5] For that reason, we find it unnecessary to address Appellants' alternative theory that Moreno gave advance consent to the search.

> pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only their persons, but in their safe conduct. The constitution and the laws are framed for the public good, and the protection of all citizens from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law.

Lawson v. Kolender, 658 F.2d 1362, 1368 n.13 (9th Cir. 1981) (quoting *People v. Defillippo*, 262 N.W.2d 921, 924 (Mich. Ct. App. 1977)) (quoting *Pinkerton v. Verberg*, 44 N.W. 579, 582-83 (Mich. 1889)), *rev'd on other grounds*, 443 U.S. 31 (1979); *see also United States v. Mendenhall*, 446 U.S. 544, 550 (1980) ("There is no question . . . that the respondent [had a] constitutional right of personal security as she walked through the Detroit Airport. . . ."); *Terry*, 392 U.S. at 9 ("Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland.") (citations omitted).

In *Terry*, the State argued that a pat-down of a suspect's body for weapons was a *de minimis* intrusion for the purpose of Fourth Amendment analysis. *Id.* at 16. Although the Court agreed that a limited stop-and-frisk was less intrusive than a full-blown arrest and search, it "emphatically rejected" the State's contention that the intrusion was constitutionally insignificant:

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." *It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.*

Id. at 16-17 (emphasis added). The Court went on to describe the encounter as an "annoying, frightening, and perhaps humiliating experience." *Id.* at 25; *cf. Kincade*, 379 F.3d at 836 (plurality opinion) (stating that the intrusion occasioned by a compulsory blood test was "'not significant'" because it involves "'virtually no risk, trauma, or pain'") (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989)).

The search to which Moreno was subjected must also have been annoying, frightening, and humiliating. He was ordered to assume a vulnerable position for an investigatory pat-down, his personal effects were emptied onto the hood of a marked patrol car in full view of the neighborhood, and he was locked into the back seat of the patrol car. Whereas *Terry* involved the comparatively minor intrusion of an investigatory detention and a pat-down for weapons, there is little doubt that Moreno and his companion were subject to a full-blown arrest and search. Moreno could not reasonably have concluded that he was

free to go about his business when he was locked inside the patrol car. *See Bostick*, 501 U.S. at 437 (holding that in determining whether one has been seized, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business' ") (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). And the fact that Moreno was locked in the car after he was patted down and questioned makes it impossible to argue that the detention was anything but a full custodial arrest. *See Dunaway v. New York*, 442 U.S. 200, 212 (1979); *Florida v. Royer*, 460 U.S. 491, 499 (1983) ("In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest."). Moreno certainly had a legitimate expectation of privacy with respect to the contents of his pockets, especially in light of the fact that a *Terry* pat-down had previously been conducted and no weapons or contraband were found. *See Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993); *United States v. Miles*, 247 F.3d 1009, 1015 (9th Cir. 2001). We are confident that no court would countenance the intrusion to which Moreno was subjected, were it imposed on an ordinary person unfettered by parole conditions, unless it was supported by probable cause.

3. *California's Interest in Supervising its Parolees*

"In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements. The State thus has an overwhelming

interest in ensuring that a parolee complies with those requirements and is returned to prison if he fails to do so." *Scott*, 524 U.S. at 365.

California's interest in supervising parolees, like its interest in supervising probationers, is twofold. First, it has an interest in ensuring that its offenders successfully complete their terms and become integrated back into the community. *See Knights*, 534 U.S. at 120; *Griffin*, 483 U.S. at 875 (noting that probation conditions are "meant to assure that the probation serves as a period of genuine rehabilitation"). Second, it has an interest in protecting the public from the harm that recidivist parolees can cause.[6] *See Latta*, 521 F.2d at 249 (plurality opinion) (describing the duty of parole officers to "prevent [] possible further antisocial or criminal conduct by the parolee"). The traditional assumption has been that close supervision promotes the purposes of parole by reducing an offender's opportunity to commit another crime or otherwise violate the terms of his or her release. *See Griffin*, 483 U.S. at 875 (holding that "more intensive supervision can reduce recidivism") (citing Petersilia, Probation and Felony Offenders, 49 Fed. Probation 9 (June 1985)).

But our task is not simply to weigh the gravity of California's interests in rehabilitating its parolees and protecting its citizens; we must also assess the degree to

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[6] California has the highest recidivism rate in the nation, with 70 percent of its paroled felons re-offending within the first 18 months of their release. *Crawford*, 372 F.3d at 1069 (Trott, J., concurring) (citing Joan Petersilia, Challenges of Prisoner Reentry and Parole in California, 12 CPRC (June 2000)). A full 68 percent of adult parolees are returned to prison: 55 percent for a parole violation and 13 percent for the commission of a new felony offense. *Id.*

which suspicionless searches actually advance those interests. *See Knights*, 534 U.S. at 118-19. It is not clear that suspicionless searches advance either the deterrent or rehabilitative purpose of parole. More recent studies suggest that close supervision of offenders has relatively little impact on recidivism rates. Joan Petersilia, A Decade of Experimenting with Intermediate Sanctions: What Have We Learned? 62 Federal Probation 3, 6 (Dec. 1998) (finding that close supervision "did not decrease subsequent arrests or overall justice system costs," and rejecting the premise that "increased surveillance acts as a constraint on the offender and that the likelihood of detection acts as a deterrent to crime"). After all, parole is intended to provide a transition between prison, which allows for very little privacy, and freedom, inherent in which is a great deal of privacy. In sum, the State has not shown that suspicionless searches, which mimic the conditions of prison, significantly advance the purposes of parole beyond searches based on a reasonableness requirement.

4. *The Reasonable Suspicion Standard*

Apart from cases presenting a "special need, beyond ordinary law enforcement," courts have generally required some level of individualized suspicion in order to meet the Fourth Amendment's "reasonableness" test.[7] The Supreme

[7] Even "special needs" cases have required individualized suspicion in order to conduct targeted searches of individuals. *See T.L.O.*, 469 U.S. at 347; *Griffin*, 483 U.S. at 879-880. The only truly suspicionless searches that have been permitted under the "special needs" doctrine involve cases in which blanket searches or seizures of broad groups of individuals were required. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 889 (2004) (checkpoint established to question all motorists

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Court emphasized the existence of a "reasonable suspicion" when it affirmed the probation searches in both *Griffin*, 483 U.S. at 871, and *Knights*, 534 U.S. at 121. We cited the "reasonable suspicion" standard when evaluating the constitutionality of a parole search in *United States v. Dally*, 606 F.2d 861, 863 (9th Cir. 1979) (holding that a parole search was "reasonable" under the Fourth Amendment because the parole officer had a "reasonable belief" that the parolee had violated his parole by changing addresses), and after concluding that the Fourth Amendment rights of parolees and probationers were indistinguishable, we applied the "reasonable suspicion" standard when evaluating the search of a probationer in *Davis*, 932 F.2d at 758 ("The permissible bounds of a probation search are governed by a reasonable suspicion standard."). *See also United States v. Stokes*, 292 F.3d 964, 967 (9th Cir. 2002) (holding that "the probation officer was entitled to carry out a search of Stokes' vehicle with no more than reasonable suspicion that he was engaged in criminal activity"). Even were we free to do so, we see no reason to abandon that standard here. Taking into account the reduced privacy rights enjoyed by parolees and the State's interest in rehabilitating parolees and deterring crime, we hold that the Constitution requires that a law enforcement officer must, at minimum, have a reasonable suspicion that a parolee has engaged in criminal wrongdoing or violated his parole prior to arresting him or conducting a search of his person.[8]

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regarding a crime in the area); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (suspicionless drug testing of student athletes).

[8] The concurring opinion relies heavily on Judge Trott's concurring opinion in *Crawford* that the applicable standard should be that a

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Viewing the evidence in the light most favorable to Moreno, we conclude that Appellants lacked reasonable suspicion to detain and search him. Neither Banks nor Garcia had received any information that would cause them to suspect Moreno of any illegal activity. Banks asserts that Moreno was in a high crime area and looked nervous on seeing the police car. But Moreno denies reaching into his pocket, or bending to his side and placing anything on the ground. These facts, when viewed in the light most favorable to Moreno, do not give rise to reasonable suspicion. *See United States v. Chavez-Valenzuela*, 268 F.3d 719, 726 (9th Cir. 2001) (holding that "nervousness alone" does not give rise to reasonable suspicion), *amended by* 279 F.3d 1062 (9th Cir. 2002); *United States v. Garcia-Camacho*, 53 F.3d 244, 247 (9th Cir. 1995) (holding that a "surprised" and "terrified" look on the defendant's face when pulled over by law enforcement does not give rise to reasonable suspicion); *United States v. Rodriguez*, 976 F.2d 592, 595-96 (9th Cir. 1992) (holding that the defendant's repeated glances at law enforcement officers through a rear-view mirror did not give rise to reasonable suspicion), *amended by* 997 F.2d 1306 (9th Cir. 1993); *cf. Stokes*, 292 F.3d at 967-68 (holding that the reasonable suspicion standard was met where the officer knew the defendant, knew that the defendant was on probation subject to a search condition, and had reliable information linking defendant to the theft of guns from his co-worker).

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parole search not be "arbitrary, capricious, or harassing." Concurrence at 2692, 2693. Regardless of Judge Trott's reasoning in his *Crawford* concurrence, however, the court's opinion in *Crawford* explicitly declined to consider what level of suspicion was required to justify the search at issue. *See Crawford*, 372 F.3d at 1054.

B. Did the Existence of the Outstanding Bench Warrant Retroactively Justify the Arrest and Search?

Appellants argue in the alternative that the search was reasonable under the Fourth Amendment because there was an outstanding misdemeanor warrant for Moreno's arrest. We agree that, depending on its contents and the manner in which it was executed, the existence of an arrest warrant could have rendered Moreno's arrest "reasonable," *cf. United States v. Leon*, 468 U.S. 897, 914 (1984), and that a search incident to a lawful arrest would have been permissible under *United States v. Robinson*, 414 U.S. 218, 235 (1973). It is undisputed, however, that Deputies Banks and Garcia were not aware of Moreno's outstanding arrest warrant at the time of the seizure. Thus, we must confront the question of whether a search or seizure can be considered "reasonable" if the fact that rendered the search "reasonable" (in this case, the outstanding arrest warrant) was unknown to the officer at the time of the intrusion.[9] We hold that it cannot.

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[9] We need not reach the separate question of whether the search was retroactively justified by the existence of a parole condition that rendered the suspicionless search reasonable, because we hold that the search would not have been reasonable even if the officers knew of Moreno's status as a parolee and the conditions of his parole at the time of the arrest and search. But we note that the California Supreme Court rejected an identical argument in *People v. Sanders*, 73 P.3d 496 (Cal. 2003), when it held that the "police cannot justify an otherwise unlawful search of a residence because, unbeknownst to the police, a resident of the dwelling was on parole and subject to a search condition." *Id.* at 505. The court concluded that while parolees have a reduced expectation of privacy, they "need not anticipate that officers with no knowledge of the probationer's existence or search condition may freely invade their residence in the absence of a warrant or exigent circumstances." *Id.* at 504 (quoting *People v. Robles*, 3 P.3d 311, 317

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It is well established that under the Fourth Amendment, to arrest a suspect on probable cause, the "facts and circumstances within the officer's knowledge [must be] sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott v. United States*, 436 U.S. 128, 137 (1978); *see also Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("We have described reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity, and probable cause to search as existing where the *known facts and circumstances* are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.") (emphasis added) (citation omitted); *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (holding that "factual determinations bearing upon search and seizure" must be judged against an "objective standard" based on "facts available to the officer at the moment").[10]

(Cal. 2000)). The court noted that its decision "flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted." *Id.* at 505.

[10] *See also Thacker v. City of Columbus*, 328 F.3d 244, 261 (6th Cir. 2003); *United States v. Castro*, 166 F.3d 728, 733 (5th Cir. 1999) ("Probable cause exists when the totality of facts and circumstances within a police officer's knowledge *at the moment of arrest* are sufficient for a reasonable person to conclude that the suspect had committed, or was in the process of committing, an offense.") (emphasis added); *Taylor*

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In *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (per curiam), we held that a police officer's knowledge that a man was subject to an outstanding bench warrant, which he acquired only after unlawfully seizing the man, did not retroactively render the seizure of that man "reasonable" under the Fourth Amendment. *Id.* at 90-91. In that case, the officer spotted a man jaywalking and summoned him to his police car. After reviewing the man's identification, the officer detained the man long enough to write a jaywalking citation. We held that the temporary seizure during which the police checked the man's identification and wrote the citation was reasonable under the Fourth Amendment because it was "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 90 (quoting *Terry*, 392 U.S. at 16, 19). But the officer continued to detain the man after the citation was written for the sole purpose of running a warrant check on him. The warrant check turned out positive, and the officer arrested him on that basis. A search incident to that arrest revealed a package of counterfeit money orders. We held that the detention of the man for the purpose of running the warrant check was "unreasonable," and the evidence was properly suppressed at trial, because at the time it was conducted, the officer

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v. Waters, 81 F.3d 429, 434 (4th Cir. 1996) ("In assessing the existence of probable cause, courts examine the totality of the circumstances known to the officer *at the time of the arrest.*") (emphasis added). Indeed, in addressing the converse situation, in which law enforcement officers arrested a man because they reasonably believed that an outstanding arrest warrant existed when in fact it did not, the Supreme Court found that the seizure was "reasonable" (for the purpose of applying the "good faith" exception to the exclusionary rule) precisely because it was justified based on the facts known to the officers at the time. *Leon*, 468 U.S. at 926.

"had no reasonable grounds to be suspicious that there might be a warrant outstanding against him." *Id.* at 91; *see also United States v. Johnson*, 256 F.3d 895, 903 (9th Cir. 2001) (en banc) (Ferguson, J., joined by Schroeder, Pregerson, and Paez, JJ.) ("We have never held that an officer lacking any prior objective knowledge of the use of an out-building may approach it free of Fourth Amendment constraints."); *United States v. DiCesare*, 765 F.2d 890, 899 (9th Cir. 1985) ("[T]he acquisition of probable cause during an unlawful seizure does not cure the illegality and does not constitute an independent source of probable cause."), *amended by* 777 F.2d 543 (9th Cir. 1985).

Appellants cite to *Whren v. United States*, 517 U.S. 806 (1996), for the proposition that the underlying intent or motivation of the police is irrelevant for Fourth Amendment search and seizure purposes. *Id.* at 813. But *Whren* held only that the illegitimate subjective motivation of a police officer will not invalidate an *otherwise constitutional seizure* that is "objectively justifiable" based on facts known to the officer. *Id.*; *see also United States v. Cervantes*, 219 F.3d 882, 890 (9th Cir. 2000) ("It is important to remember that the foundation of the Court's position in *Whren* is that 'where the search or seizure is based upon probable cause' there is with rare exception no balancing to be done or reasonableness determination to be made because the probable cause itself serves as the exclusive 'measure of the lawfulness of enforcement.'") (quoting Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.4 (3d ed. 1996) (footnote omitted)); *United States v. Wallace*, 213 F.3d 1216, 1219 (9th Cir. 2000) ("The fact that the alleged traffic violation is a pretext for the stop is irrelevant, so long as the objective

circumstances justify the stop."). In other words, although *Whren* stands for the proposition that a pretextual seizure based on the illegitimate subjective intentions of an officer may be permissible, it does not alter the fact that the pretext itself must be a constitutionally sufficient basis for the seizure and the facts supporting it must be known at the time it is conducted. *Whren*, 517 U.S. at 813. In this case, as in *Luckett*, it is undisputed that Appellants were not aware of the fact that Moreno was subject to an outstanding arrest warrant at the time they arrested him. Therefore, there are no facts from which we can conclude that the suspicionless arrest and search in this case were objectively justifiable.

Appellants' reliance on cases dealing with one's "standing" to bring a Fourth Amendment challenge, *Minnesota v. Carter*, 525 U.S. 83 (1998), *United States v. Padilla*, 508 U.S. 77 (1993), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), is likewise unavailing. In each of those cases, there was a question as to whether the person challenging the search had standing because he or she lacked a legitimate expectation of privacy in the place searched or the thing seized. *See Carter*, 525 U.S. at 91 (holding that respondent lacked standing to bring Fourth Amendment challenge based on police search of another person's home because respondent had no expectation of privacy therein); *Padilla*, 508 U.S. at 81-82 (remanding for factual determination as to whether petitioner had a legitimate privacy interest in a seized automobile in which he had no ownership interest and was not a passenger); *Rawlings*, 448 U.S. at 105-06 (holding that petitioner could not challenge the search of another person's purse because he lacked a reasonable expectation of privacy therein). By contrast, there is no question that Moreno

had standing to challenge the search and seizure of his own person. *See Terry*, 392 U.S. at 9 ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.") (quoting *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891)). And, in any case, Appellants' argument relies on the assumption, which we reject, that as a result of the outstanding arrest warrant, Moreno had no Fourth Amendment rights at all.

C. Were the Constitutional Rights at Issue Clearly Established?

Having established that Appellants violated Moreno's constitutional rights when they conducted the suspicionless search and seizure, we must evaluate whether those rights were clearly established at the time of the incident and whether the "unlawfulness [of Appellants' conduct] was apparent in light of preexisting law." *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995).

> It is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of defendants' actions] was apparent in light of preexisting law. Closely analogous preexisting case law is not required to show that a right was clearly established. In other words, while there may be no published cases holding similar policies constitutional, this may be due more to the obviousness of the illegality than the novelty of the legal issue.

Sorrels v. McKee, 290 F.3d 965, 970 (9th Cir. 2002). "[W]hen an officer's conduct 'is so patently violative of the

constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.'" *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004) (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001)).

Deputies Banks and Garcia detained and searched Moreno based on his nervous behavior when he spotted the patrol car in an area known for high crime.[11] They contend that their actions were justified (1) because, as a result of Moreno's parole status and his outstanding arrest warrant, no level of suspicion was required in order to arrest and search him, and (2) even if reasonable suspicion was required to search Moreno, the officers had reasonable suspicion based on Moreno's nervous behavior in a high crime area. Both contentions are untenable.

Appellants' first argument in favor of qualified immunity – that it was not clearly established that Moreno had any right to be free from suspicionless searches because of his parole status and his outstanding arrest warrant – relies on the two alternate assertions discussed above, both of which must fail. When evaluating whether a law enforcement officer was on notice that his conduct was unlawful in a particular instance, we look only to the "circumstances presented to [the] officer." *Saucier*, 533 U.S. at 209. The "relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct

[11] Because we view the facts in the light most favorable to the nonmoving party, we do not consider the officers' contention, which Moreno denies, that Moreno removed an object from his pocket and placed it on the ground.

was unlawful *in the situation he confronted.*" *Id.* at 202 (emphasis added).

Appellants' first assertion – that the parole search condition stripped Moreno of "a normal scope of Fourth Amendment protection" – does not justify the suspicionless search and seizure. While Moreno's parole status may have rendered it unclear what level of suspicion was required to conduct such a warrantless search, it was clearly established that a parolee was not stripped of all Fourth Amendment protection whatsoever. *Cf. Griffin*, 483 U.S. at 873 (stating that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable'")[12]; *United States v. Guagliardo*, 278 F.3d 868, 873 (9th Cir. 2002) (rejecting the argument that a probation condition requiring submission to any search by law enforcement or probation officers was overbroad on the basis that such a search is valid if supported by reasonable suspicion); *United States v. Conway*, 122 F.3d 841, 844-45 (9th Cir. 1997) (discussing, but declining to decide, whether the search of a probationer's residence required probable cause or only reasonable suspicion); *Davis*, 932 F.2d at 758 (stating that "[t]he permissible bounds of a probation search are governed by a reasonable suspicion standard"); *Latta*, 521 F.2d at 248 (stating that "[i]t is . . . too late in the day to assert that searches of parolees . . . present no Fourth Amendment issues").

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[12] As discussed above, we have recognized that there is no "constitutional difference between probation and parole for purposes of the fourth amendment." *Harper*, 928 F.2d at 896 n.1.

Second, because the Deputies did not know of Moreno's parole status and his outstanding arrest warrant at the time they searched and seized him, those circumstances cannot justify their conduct. And in any case, at the time of the incident in this case, it was clearly established that the facts upon which the reasonableness of a search or seizure depends, whether it be an outstanding arrest warrant, a parole condition, or any other fact, must be known to the officer at the time the search or seizure is conducted. *Rodriguez*, 497 U.S. at 188; *Luckett*, 484 F.2d at 90-91.

Appellants' other argument – that the officers reasonably believed that the facts known to them constituted "reasonable suspicion" – is also unpersuasive. It was well-established at the time of Moreno's detention that nervousness in a high crime area, without more, did not create reasonable suspicion to detain an individual. In *Chavez-Valenzuela*, 268 F.3d at 725, we noted that although the Ninth Circuit had not yet ruled on whether nervousness alone constitutes reasonable suspicion, the Sixth, Seventh, and Eleventh Circuit had concluded (prior to 2000) that appearing nervous is only one of several factors for finding reasonable suspicion. *See United States v. Hill*, 195 F.3d 258, 272 (6th Cir. 1999); *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1996). We also noted that "no circuit has held that nervousness alone suffices to create reasonable suspicion." *Chavez-Valenzuela*, 268 F.3d at 726; *see also Brown v. Texas*, 443 U.S. 47, 52 (1979) (holding that officers did not have reasonable suspicion for an investigatory stop when they detained two men who were walking away from each other in an alley in an area known for drug trafficking because "the . . . activity was no different from the activity of other pedestrians in that neighborhood"). The

Supreme Court has held that in some circumstances an individual's flight from law enforcement in a high crime area can justify an investigatory seizure. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). But Moreno's simple act of walking away from the officers could not have been reasonably mistaken for the type of "flight" the officers confronted in *Wardlow*. *See United States v. Valentine*, 232 F.3d 350, 357 (3d Cir. 2000) ("Walking away from the police hardly amounts to the headlong flight considered in *Wardlow* and of course would not give rise to reasonable suspicion by itself, even in a high-crime area[.]"). Interpreting all disputed issues of fact in favor of Moreno, as we must, we hold that no reasonable officer could have concluded that the circumstances confronted by Appellants in this case gave rise to "reasonable suspicion."

CONCLUSION

For the foregoing reasons, we affirm the district court's denial of qualified immunity and remand for further proceedings.

AFFIRMED and REMANDED.

CLIFTON, Circuit Judge, concurring in the judgment:

I agree with my colleagues that the district court properly denied Defendants' motion for summary judgment based on their qualified immunity defense, and thus I concur in the judgment affirming the decision of the district court. I write separately, however, because I disagree with the majority's stated conclusion that the Defendants' actions violated Moreno's constitutional rights on the theory that reasonable suspicion is required to

justify a search or seizure of a parolee, even though the relevant terms of Moreno's parole would appear to permit a warrantless search or seizure. The majority's conclusion to that effect is entirely irrelevant to the result reached in this case and should appropriately be disregarded.

Defendants' motion for summary judgment is based on a claim of qualified immunity. As the majority correctly notes, *ante* at 2665, the Supreme Court, in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), established a two-step analysis for determining whether a law enforcement officer is entitled to qualified immunity. The first question is whether the facts alleged, taken in the light most favorable to the party asserting the injury, meaning Moreno in the current case, "show the officer's conduct violated a constitutional right." *Id.* The second question is "whether the right was clearly established." *Id.* In order to deny Defendants' summary judgment motion based on a defense of qualified immunity, we must conclude not only that Defendants violated Moreno's constitutional right, but also that the right at issue was clearly established.

As the majority notes, Defendants have argued that Moreno's Fourth Amendment rights were not violated by the detention and search in this case because these actions were consistent with Moreno's parole condition. In order to reach this question, however, the court must first determine whether Defendants can retroactively justify the arrest and search of Moreno based on his parole condition and outstanding arrest warrant, even though the officers were unaware of these facts at the time.

In addressing this question, the majority correctly concludes that

> because the Deputies did not know of Moreno's parole status and his outstanding arrest warrant at the time they searched and seized him, those circumstances cannot justify their conduct. And in any case, at the time of the incident in this case, it was clearly established that the facts upon which the reasonableness of a search or seizure depends, whether it be an outstanding arrest warrant, a parole condition, or any other fact, must be known to the officer at the time the search or seizure is conducted. [*Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) *Rodriguez*, 497 U.S. at 188; *United States v. Luckett*, 484 F.2d 89, 90-91 (9th Cir. 1973) (per curiam)].

Ante at 2686. On this basis alone, the court must deny Defendants' qualified immunity defense, at this stage of the case, and affirm the judgment of the district court. There is no reason to consider whether Plaintiff's parole condition altered his Fourth Amendment rights because Defendants were not aware he was on parole when they conducted the search.

Regardless, the majority reaches out to address this question and to try to announce a new rule of law – specifically, that "the Constitution requires that a law enforcement officer *must, at minimum, have a reasonable suspicion* that a parolee has engaged in criminal wrongdoing or violated his parole prior to arresting him or conducting a search of his person." *Ante* at 2678 (emphasis added). The majority supports its announcement by asserting that in *United States v. Knights*, 534 U.S. 112, 121 (2001), the Supreme Court held that "reasonable suspicion was

required to search the probationer's house."[1] *See ante* at 2670. That is plainly wrong.

In *Knights*, the Supreme Court held that "*no more than* reasonable suspicion" is required to conduct a search of a probationer's house. 534 U.S. at 121 (emphasis added). Since it had already been determined that reasonable suspicion existed in that case, the Court did not need to consider whether the search in question could be supported by something less. And the Court did not simply leave that for readers to infer. It said as much, in so many words:

> We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy (or constituted consent) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

Id. at 120 n.6 (internal citation omitted). *Knights* does not support the rule which the majority opinion attempts to build on top of it.

The history of this issue before our court further explains why the majority opinion's declaration is unnecessary and inappropriate in the current case. In order to

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[1] As the majority notes, we have treated probationers and parolees the same for purposes of Fourth Amendment analyses. *See ante* at 2670 (citing *United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004)).

hold that Defendants are not entitled to qualified immunity, the court has to determine that Defendants violated a constitutional right that was "clearly established." *See Saucier*, 533 U.S. at 195, 201 (2001). It is impossible to conclude that, at the time of the incident in question, it was clearly established that a parolee had a right to be free of any search or detention that was not supported by reasonable suspicion. The *Knights* footnote quoted above indicates as much. The *Knights* decision was announced in December 2001. If the issue remained open at that point in time, the rule of law which the majority opinion in this case purports to apply here surely was not "clearly established" twenty-three months earlier, in January 2000, when the events at issue in this case occurred.

Moreover, the members of our court, including specifically the members who make up the majority in this case, are very aware of that fact, because we have history with this issue. A three-judge panel of this court issued an opinion in May 2003 which adopted the same view as the majority in this case, that "reasonable suspicion" was required to justify a search of a parolee, despite parole terms which permitted search without such suspicion, and that a search without such reasonable suspicion violated the constitutional right of the parolee. *See United States v. Crawford*, 323 F.3d 700 (9th Cir. 2003). The panel was split 2-to-1, with one judge dissenting. The author of the majority opinion in the current case was one of the two judges who formed the majority in the *Crawford* three-judge panel opinion. To be sure, that decision was not announced until more than three years after the January 2000 events at issue in this case, so it could not support any claim that the doctrine in question was clearly established at the time relevant to this matter. More importantly,

that opinion was set aside when a majority of all the active judges of this court voted to rehear the case en banc. *See United States v. Crawford*, 343 F.3d 961 (9th Cir. 2003). Since the subsequent en banc panel decided not to adopt its reasoning, the opinion of the original three-judge panel has no precedential effect today.

On rehearing en banc, our court resolved that case without determining whether a suspicionless search of a parolee's residence violated the Fourth Amendment: "We need not and do not decide . . . whether suspicionless parole searches violate the Fourth Amendment." *United States v. Crawford*, 372 F.3d 1048, 1054 (9th Cir. 2004) (en banc). It became unnecessary to reach that issue in *Crawford* because we concluded that, even assuming that reasonable suspicion was required to search a parolee's residence, the confession later given by the defendant in that case was too far removed from the allegedly improper search to require suppression of Crawford's confession.

Separately, though, five members of that *Crawford* en banc panel, most of whom also joined in the *Crawford* en banc panel majority opinion authored by Judge Graber, proceeded to address the issue of a parolee's Fourth Amendment rights and reached a conclusion different from that of the two judges who make up the majority in the current case. Specifically, as expressed in the separate concurring opinion of Judge Trott, those five judges concluded that a law enforcement officer's search of a parolee's residence is reasonable so long as the search is not "arbitrary, capricious, or harassing." *Id.* at 1063 (Trott, J., concurring). In so concluding, the *Crawford* concurrence explicitly rejected the notion, embraced by the majority in the current case, that a parolee cannot be searched absent a degree of individualized suspicion. *Id.* at 1076. I was one

of the five judges who joined Judge Trott's concurring opinion, and I continue to adhere to the position expressed there. Thus, I disagree with the reasoning and conclusion on that subject expressed in the majority opinion in the current case. Rather than repeat what Judge Trott has already written, I incorporate his discussion by reference. It is important to note that the view expressed in the *Crawford* concurrence, though not adopted by the en banc panel in that case, was not rejected by our court in that case, either.

As it happens, the two judges who support the majority opinion in the current case were also members of the en banc panel in *Crawford*.[2] They were two of the three judges who joined a dissenting opinion in *Crawford*, authored by Judge William Fletcher. 372 F.3d at 1082. The principal thrust of that dissent was the same position asserted by the majority opinion here, that a parolee search without reasonable suspicion violated the Fourth Amendment. That position was *not* adopted by the remaining eight members of the 11-judge en banc panel.

Having joined a *dissenting* opinion which took the same position just a few months ago, my colleagues are well aware that the "constitutional right" which they purport to identify in this case could not fairly be characterized as "clearly established," under the *Saucier* test. The history of the *Crawford* case makes such a conclusion impossible.

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[2] Although that might be unremarkable in other circuits, our court utilizes a "limited en banc" court system, under which an en banc panel consists of 11 judges and does not include all active judges of our court. *See* 9th Cir. R. 35-3.

Under these circumstances, the majority's digression to assert that the Constitution requires reasonable suspicion to search a parolee, regardless of the terms of parole, amounts to no more than a frolic. Since no such "right" was "clearly established," the purported existence of such a right could never support the resolution of this case.

The majority attempts to evade this problem by stating that it was "clearly established that a parolee [is] not stripped of all Fourth Amendment protection whatsoever." *Ante* at 2685. But that is a far cry from the proposition that it was "clearly established" that a parolee search requires reasonable suspicion. Judge Trott's concurring opinion in *Crawford*, which staked out a position opposed to that of the majority here, illustrates. Judge Trott did not assert that a parolee was stripped of all Fourth Amendment protection. To the contrary, he specifically recognized that a parolee search could not be "arbitrary, capricious, or harassing." 372 F.3d at 1063. That a parolee may benefit from Fourth Amendment protection does not necessarily mean that a search cannot be conducted without reasonable suspicion. For the majority opinion here to say that it was clearly established that a parolee has not lost all Fourth Amendment protection falls far short of what is needed to sustain the rule it attempts to announce.

Moreover, the cases cited in the majority opinion do not actually support the new doctrine it announces here, because the question of whether a parolee could be searched or detained on less than reasonable suspicion did not have to be resolved in those cases, just as it did not have to be resolved in *Knights*. *See Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) (concluding that search of probationer's home was reasonable within the meaning of the

Fourth Amendment); *United States v. Guagliardo*, 278 F.3d 868, 873 (9th Cir. 2002) (affirming probation requirement requiring probationer to submit to searches without considering whether particular search violated the Fourth Amendment); *United States v. Conway*, 122 F.3d 841, 845 (9th Cir. 1997) (determining that officers had probable cause to search probationer's residence); *United States v. Davis*, 932 F.2d 752, 760 (9th Cir. 1991) (concluding that police had reasonable suspicion to conduct search); *Latta v. Fitzharris*, 521 F.2d 246, 252 (9th Cir. 1975) (finding that search was not unreasonable).

Since the "right" purportedly announced by the majority opinion here could not be held to have been clearly established in January 2000, the recognition of such a "right" cannot be the basis for denying Defendants' qualified immunity defense and for affirming the judgment of the district court. The majority's assertion that a constitutional right of Moreno was violated because reasonable suspicion is required to justify a search and seizure of a parolee is simply irrelevant to the resolution of this case.

We have held that "'where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.'" *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam), *quoting United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc). *But see Miller v. Gammie*, 335 F.3d 889, 902 (9th Cir. 2003) (Tashima, J., concurring) (arguing that when a three-judge panel reaches a conclusion that is unnecessary to the resolution of the case, this conclusion is non-binding dicta). As

discussed above, the majority's conclusion in this case that a law enforcement officer must, at minimum, have a reasonable suspicion before searching or detaining a parolee has nothing to do with the resolution of this case, and so it should not qualify as germane.

Furthermore, as the officers were not aware of Moreno's parole condition at the time of his search and detention, the facts in this case only present the hypothetical question of what level of suspicion is required when an officer searches or detains a parolee and knows of the parole status and of the terms or conditions of parole which appear to authorize a search without warrant or "reasonable suspicion." This court has previously observed that "'an opinion advising what the law would be upon a hypothetical state of facts'" is advisory and thus, nonbinding. *See Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1082 (9th Cir. 2004) (*quoting North Carolina v. Rice*, 404 U.S. 244, 246 (1971)), *vacated as moot on other grounds* 389 F.3d 1307 (2004).

Consequently, as the majority's statement that reasonable suspicion is required to justify a search and seizure of a parolee is unnecessary to resolve this case and is a discussion regarding a hypothetical set of facts, that announcement should be treated as a bit of dictum, which should have no binding or precedential impact in future cases. That question will not be resolved by this panel, of course. The next panel of this court to encounter the underlying question may consider it. But I feel compelled to make clear my disagreement with the view expressed in the majority opinion and suggest that it be both read with caution and paid no heed in the future.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

R. MORENO, Plaintiff, v. LE ROY BACA, et al., Defendants.	CASE NO.: CV 00-7149 ABC (CWx) ORDER RE: GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Feb. 25, 2002)

This cases arises out the arrest, and subsequent prosecution, of Plaintiff R. Moreno ("Plaintiff" or "Moreno") for alleged possession of illicit drugs. Plaintiff filed a complaint on June 30, 2000 against the deputies of the Los Angeles County Sheriff's Department ("LACS") involved in his arrest, Los Angeles Sheriff Leroy Baca, and Los Angeles County Supervisors on the ground that the arrest was illegal and that Plaintiff's civil rights were therefore violated. *See* Complaint ¶ 4.

Defendants Leroy Baca ("Baca"), Deputy Sean Burke ("Burke") and Deputy Thomas Garcia ("Garcia") (collectively, "Defendants") filed a motion for summary judgment which came on for hearing before this Court on February 25, 2002 (the "Motion"). For the reasons indicated below, Defendants' Motion for Summary Judgment is DENIED in part and GRANTED in part.

I. STANDARD ON A MOTION FOR SUMMARY JUDGMENT

The party moving for summary judgment has the initial burden of establishing that there is "no genuine

issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); *see British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978); *Fremont Indemnity Co. v. California Nat'l Physician's Insurance Co.*, 954 F.Supp. 1399, 1402 (C.D. Cal. 1997).

If the moving party has the burden of proof at trial (*e.g.*, a plaintiff on a claim for relief, or a defendant on an affirmative defense), the moving party must make a "showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (quoting from Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)). Thus, if the moving party has the burden of proof at trial, that party "must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in [its] favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original); *see Calderone*, 799 F.2d at 259.

If, as here, the opponent has the burden of proof at trial, the moving party has no burden to negate the opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party does not have the burden to produce any evidence showing the absence of a genuine issue of material fact. *Id.* at 325. "Instead, . . . the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* (citations omitted).

Once the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings . . . [T]he adverse party's response . . . **must set forth specific facts** showing that there is a genuine issue for trial." Fed. R. Civ. Pro. 56(e) (emphasis added). A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish the essential elements to that party's case, and on which that party would bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in favor of the nonmovant. *Id.* at 248. However, the Court must view the evidence presented "through the prism of the substantive evidentiary burden." *Id.* at 252.

When a motion for summary judgment is based on a claim of qualified immunity, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged. . . . " *Saucier v. Katz*, 121 S.Ct. 2151, 2155 (2001). "[T]he next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case. . . . " *Id.* at 2156.

II. PROCEDURAL HISTORY

Plaintiff filed his Complaint in this Court on June 30, 2000, against defendants Baca, Banks, Garcia, Michael Antonovich ("Antonovich"), Yvonne Burke ("Burke"),

Donald Knabe ("Knabe"), Gloria Molina ("Molina") and Zev Yaroslavsky ("Yaroslavsky"). The Complaint asserted the following causes of action: (1) damages for deprivation of civil rights and conspiracy to deprive civil rights pursuant to 42 U.S.C. § 1983, (2) declaratory relief pursuant to 28 U.S.C. § 2201, (3) injunctive relief pursuant to 28 U.S.C. § 1651, (4) class action allegations pursuant to Fed. R. Civ. P. 23 and Local Rule 18 and (5) Racketeer Influenced and Corrupt Organizations ("RICO") claims for damages and for declaratory relief pursuant to 28 U.S.C. 1961, *et seq.*[1] On September 11, 2000, Plaintiff filed a First Amended complaint against the same defendants and alleging the same causes of action.

On July 26, 2000, defendants Yaroslavsky, Banks and Garcia filed a motion to dismiss all claims alleged against Yaroslavsky, to dismiss the class allegations and to dismiss the RICO claim. On October 13, 2000, the Court denied the motion to dismiss as to all claims alleged against Yaroslavsky and denied the motion to dismiss the class allegations as premature. *See* Court's October 13, 2000 Order at 5. The Court granted the motion to dismiss as to the RICO claim and dismissed the RICO claim with prejudice. *See* Court's October 13, 2000 Order at 6.

On December 19, 2000, defendant Baca filed a motion to dismiss claims against him. On February 8, 2001, the Court denied that motion.

On January 29, 2001, defendants Antonovich and Burke filed a motion to dismiss claims against them. On

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[1] The Court dismissed the RICO claims against Yaroslavsky, Banks and Garcia on October 13, 2000, and against Antonovich and Burke on February 14, 2001.

February 14, 2001, the Court granted this motion with respect to the RICO claim and denied it as to all other claims.

On February 26, 2001, the Court set the discovery cut-off date to August 31, 2001, the motion cut-off date to September 10, 2001, the pre-trial conference to November 19, 2001 and the jury trial to December 4, 2001.

On May 14, 2001, defendants Baca, Antonovich, Yaroslavsky, Banks and Garcia filed a motion for judgment on the pleadings. The Court denied this motion without prejudice on July 6, 2001 because the collateral estoppel issues raised in that motion could not be determined at that stage in the litigation.

On October 19, 2001, defendants Banks, Garcia, Baca, Yaroslavsky, Antonovich and Burke filed a motion for leave to file a motion for summary judgment beyond the schedule motion cut-off date and lodged defendants Baca, Banks and Garcia's motion for summary judgment. On November 6, 2001, the Court granted that motion and filed the Baca, Banks and Garcia motion for summary judgement.[2] Plaintiff filed his opposition to that motion on January 22, 2002 and Defendants filed their reply on January 29, 2002. On January 22, 2002, the Court granted Plaintiff's *ex parte* application for leave to file an over-sized opposition brief and accepted Plaintiff's twenty-eight page

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[2] On January 18, 2002, defendants Antonovich, Burke, Knabe, Molina, Yaroslavsky filed a motion for summary judgement. Plaintiff opposed that motion as it was filed passed the motion cut-off date without leave of Court. Accordingly, the Court declined to hear that motion.

opposition. This motion for summary judgment came on for hearing on February 25, 2002.[3]

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[3] Plaintiff has engaged in an unacceptable practice of filing additional briefs in opposition to this motion for summary judgment without leave of Court. Plaintiff should be well aware of Local Rule 7-10 which provides, in relevant part, that "[a]bsent prior written order of the court, the opposing party shall not file a response to the reply."

On January 28, 2002, Plaintiff filed a Notice of Errata to Plaintiff's Opposition to Defendants' Motion for Summary Judgment. The Court accepts this filing as it provided the Court with a page that Plaintiff had failed to include in his initial opposition. On February 5, 2002, Plaintiff filed a "Notice of Errata and Response to Defendants' Reply; Request to Strike Portions of Reply that Raise Arguments for First Time." As this "Response" was filed without leave of the Court, the Court will not consider it. Any motion to strike portions of the reply is denied both because of the improper filing of Plaintiff's motion to strike and the lack of meritorious arguments justifying striking portions of the reply. On February 7, 2002, Defendants filed a "Motion to Strike Plaintiff's Response to Reply Brief." As stated above, Plaintiff's "Response" has been stricken.

On February 11, 2002, Plaintiff filed a "Supplemental Opposition to Defendants' Motion for Summary Judgment." With this filing, Plaintiff again violated Local Rule 7-10. Not only was this "Supplemental Opposition" filed without leave of Court, in violation of Local Rule 7-10, this filing cites additional cases of which Plaintiff should have been aware when he filed his opposition. These two additional, improper, filings have provided Plaintiff with eight additional pages of argument, making Plaintiff's opposition thirty-six pages. On February 14, 2002, Defendants filed an "Application to Strike Plaintiff's Supplemental Opposition to Defendants' Motion for Summary Judgment; Request for Sanctions." Defendants assert that Plaintiff should be required to pay Defendants their reasonable costs and fees for preparing both of their motions to strike Plaintiff's "after-thought" briefing.

On February 19, 2002, Plaintiff filed a "Notice of Possible Violation of Local Rule 7-10" in which Plaintiff "apologized" for his February 5, 2002 filing (the "Notice of Errata and Response to Defendants' Reply; Request to Strike Portions of Reply that Raise Arguments for First Time") and withdrew his pleading to that extent. The Court notes that Plaintiff has not "apologized for" nor addressed his February 11, 2002

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III. STATEMENT OF FACTS [4]

On October 15, 1997, Moreno was placed on parole for a period of three years. A term of his parole was that Moreno could be "searched without a warrant by an agent of the Department of Corrections or any law enforcement officer." *See* Defendants' Statement of Uncontroverted Facts and Conclusions of Law ("Defs.' Statement") ¶ 4; Motion, Exh. G. On November 8, 1999, a bench warrant was issued for Moreno for failure to make an appearance in state court. *See* Defs.' Statement ¶ 5; Motion, Exh. F.

On the evening of January 21, 2000, Banks and Garcia (collectively, the "Officers" or "Deputies") were on patrol duty in a marked black and white patrol car the City of Terrace area of Los Angels county. Both were in uniform and Garcia was driving the marked car. *See* Motion, Exh. I ¶ 2, Exh. D ¶¶ 6, 7. The Deputies saw Plaintiff and another man, Mr. Rodriguez walking in their direction.[5] *See* Declaration of Deputy Sheriff Sean Banks ("Banks Decl.") ¶ 7; Declaration of R. Moreno ("Moreno Decl.") ¶ 5.

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filing, which also violated the Local Rules. The Court, in its discretion, declines to sanction Plaintiff. *See infra* note 28.

[4] The facts in this case are largely disputed. Although both Plaintiff's and Defendants allegations differ, especially with respect to whether Moreno placed "something" on the stoop of a building before being detained by the Officers, the Court draws all justifiable inferences in Plaintiff's favor, as it must do in a motion for summary judgment.

[5] The parties dispute whether Rodriguez and Moreno were walking side-by-side or whether Moreno was a few yards behind Rodriguez. *See* Banks Decl. ¶ 7; Moreno Decl. ¶ 5. The parties also dispute the time at which this initial encounter occurred. Moreno asserts that it occurred sometime after 5:00 p.m. and the Deputies assert that it occurred at approximately 6:50 p.m. *See* Banks Decl. ¶ 6; Moreno Decl. ¶ 3.

Deputy Banks states that it appeared to him that "Moreno was startled by our presence." *See* Banks Decl. ¶ 7. Banks asserts that he saw Moreno reach into his pocket, bend to his side, place something on the steps of an apartment building and walk away. *See* Banks Decl. ¶ 8. Deputy Banks alleges that this nervous behavior, along with the fact that the area in which these alleged events were taking place was an area with high narcotics activity, caused him to suspect that Moreno was in possession of illegal drugs. *See* Banks Decl. ¶ 9.

Moreno alleges that while he and Rodriguez were walking on the sidewalk, a Los Angeles County sheriff patrol car drove toward them, passed them, made a u-turn and then pulled up in front of them. *See* Moreno Decl. ¶ 6. Moreno asserts that at no time while he was walking did he or Rodriguez bend or stoop to place anything on the ground or on any steps. *See* Moreno Decl. ¶ 7; Plaintiff's Statement of Controverted Facts ("Pl.'s Statement") ¶ 8.

Deputy Banks and Garcia approached Moreno and Rodriguez. *See* Banks Decl. ¶ 10; Moreno Decl. ¶ 8. It is undisputed that Moreno was detained at this point.[6] *See* Banks Decl. ¶ 10, Garcia Decl. ¶ 6. The descriptions concerning the events that took place after this point vary greatly.

Banks asserts that after detaining Moreno, he recovered the item he had seen Moreno place on the building step and recognized it from his training and experience as an apparent rock of cocaine. *See* Banks Decl. ¶ 11. The Officers assert that a warrant check through the patrol car

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[6] Defendants assert that Rodriguez, however, was not detained at this point. *See* Banks Decl. ¶ 10.

computer terminal revealed that there was an outstanding arrest warrant for Moreno with bail of $10,000 and that Moreno was on active parole. *See* Banks Decl. ¶¶ 12 & 13; Garcia Decl. ¶ 8 & 9. The Officers assert that they were aware from their training and experience that a standard parole term subjects parolees to a warrantless search by any peace officer. *See* Garcia Decl. ¶ 15; Banks Decl. ¶ 14. The Officers assert that Moreno was arrested at that point for possession of cocaine and on authority of the outstanding warrant. *See* Banks Decl. ¶ 15, Garcia Decl. ¶ 11.

Moreno asserts that after the police vehicle pulled up on the curb directly in front of him and Rodriguez, the Officers exited the car and told both Moreno and Rodriguez to put their hands on the patrol car. *See* Moreno Decl. ¶ 6 & 8. According to Moreno, one of the Officers questioned him and Rodriguez as to what they were "doing around there." *See* Moreno Decl. ¶ 9. One of the officers then asked the men for identification, patted them down, emptied their pockets and put their personal items on the car. *See* Moreno Decl. ¶ 10. This same officer then instructed Moreno and Rodriguez to enter the marked car and then locked the men in the car. *See* Moreno Decl. ¶ 12. This officer then ran the men's names in the car computer and asked Moreno if he was on parole. Moreno answered in the affirmative. *See* Moreno Decl. ¶ 15.

While one of the officers was conducting this search and detaining Moreno and Rodriguez, the other officer, according to Moreno, was looking for something on the ground with a flashlight in the direction from which Moreno and Rodriguez had just walked. *See* Moreno Decl. ¶¶ 11 & 13. This officer returned to the car, talked to the other officer, and then opened the glove compartment and took out a Ziploc baggy, which he then returned to the

glove compartment. *See* Moreno Decl. ¶ 17. Rodriguez was then told to leave and Moreno was told that he was under arrest for violating his parole by virtue of being in possession of rock cocaine. *See* Moreno Decl. ¶ 20.

It is undisputed that Moreno was arrested for possession of cocaine, *see* Banks Decl. ¶ 15; Moreno Decl. ¶ 23, and that a parole hold was also placed on him. *See* Banks Decl. ¶ 15; Moreno Decl. ¶ 23.

On February 8, 2002, a probable cause hearing was held where Banks testified to the reasons for detaining and arresting Moreno. *See* Defs.' Statement ¶ 14. At this hearing, no evidence was introduced in support of the probable cause to arrest other than Banks' testimony. *Id.* The court found "sufficient cause to believe the defendant (Moreno) is guilty of the possession of cocaine as a felony, as alleged in count 1." *See* Motion, Exh. A, Transcript of Preliminary Hearing at 10. At the close of the probable cause hearing, Moreno's attorney made a motion to dismiss for insufficiency of the evidence. *See* Defs.' Statement ¶ 16. The court denied Moreno's motion to dismiss, found probable cause to believe Moreno had possessed cocaine, and held him to answer at trial. *See* Defs.' Statement ¶ 17; Motion, Exh. A, Transcript of Preliminary Hearing at 10.

At trial, Moreno was represented by counsel, who cross-examined Banks regarding his probable cause to arrest Moreno. At the close of the prosecution case, Moreno's attorney made a motion to dismiss, which was denied by the trial judge. *See* Defs.' Statement ¶ 19. On April 26, 2002, Moreno was acquitted of the possession of cocaine charge. *See* Moreno Decl. ¶ 28. Moreno was not released from custody until May 22, 2000, when his parole hold was lifted. *See* Moreno Decl. ¶ 28.

IV. DISCUSSION

Defendants move for summary judgment on the following grounds (1) the suit is barred by collateral estoppel, (2) Plaintiff's parole terms diminished his Fourth Amendment rights, (3) Plaintiff's outstanding arrest warrant authorized the actions taken by Garcia and Banks, (4) Banks and Garcia are shielded by qualified immunity (5) a Monell claim does not lie and (6) there are no triable issues of fact supporting a claim for conspiracy.[7] The Defendants also claim that Moreno has failed to properly assert class allegations and claims for injunctive and declaratory relief.

A. The Suit is Not Barred by Collateral Estoppel

Defendants contend that "Moreno is collaterally estopped from relitigating the issue of probable cause for his arrest for possession of cocaine, because that issue was determined in the preliminary hearing." *See* Motion at 6. While Plaintiff acknowledges that a finding of probable cause at a preliminary hearing generally serves to collaterally estop a subsequent civil trial addressing those probable cause issues, Plaintiff contends that the three recognized exceptions to this rule are present in the instant case. Accordingly, Plaintiff argues, the instant civil

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[7] Defendants initially argued that Sheriff Baca was entitled to summary judgment on the grounds of qualified immunity. However, this argument was withdrawn by Defendants after the Ninth Circuit's ruling in *Brewster v. Shasta County*, 275 F.3d 803 (9th Cir.2001). *See* Supplemental Brief to Defendants' Motion for Summary Judgment, filed January 2, 2002.

suit is not barred by collateral estoppel. Defendants counter that none of these exceptions apply.

The doctrine of collateral estoppel, or issue preclusion,[8] prevents re-litigation of legal and/or factual issues necessarily considered and determined in a prior legal proceeding between the same parties, or their privies. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Teitelbaum Furs, Inc. v. Dominion Insurance Co., Ltd.*, 58 Cal.2d 601, 604 (1962); *McGowan v. City of San Diego*, 208 Cal.App.3d 890, 895 (1989). The collateral estoppel doctrine applies with equal force to claims brought under Section 1983. *See Allen*, 449 U.S. at 105. Whether collateral estoppel applies in a given case is primarily a legal question. *See Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990). State law governs the application of collateral estoppel to issues that were decided in a prior state court proceeding. *See id.; Allen*, 449 U.S. at 96 (state law applicable for prior state judgments).

Under California law, collateral estoppel is applied where: (1) the issue sought to be precluded is identical to that which was decided in a prior proceeding; (2) that issue was actually litigated and necessarily decided in that proceeding; (3) there was a final judgment on the merits; and (4) the party against whom collateral estoppel is

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[8] *Res judicata* is often used to refer to a general "species" of defense including both claim preclusion and issue preclusion. It is most useful, however, to equate *res judicata* solely with claim preclusion, and *collateral estoppel* with issue preclusion. *See, e.g., Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985); *Ross v. International Broth. of Elec. Workers*, 634 F.2d 453, 457 n.6 (9th Cir. 1980); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4402 (1981). This Motion argues solely *collateral estoppel*/issue preclusion.

asserted was a party or in privity with a party to the prior proceeding. *See McCutchen v. City of Montclair*, 73 Cal. App. 4th 1138, 1145 (1999); *see also Heath v. Cast*, 813 F.2d 254, 258 (9th Cir. 1987). In California, a prior criminal proceeding may have collateral estoppel implications for a subsequent civil suit. *See, e.g., McGowan*, 208 Cal.App.3d at 895; *McCutchen*, 73 Cal. App. 4th at 1144; *Heath*, 813 F.2d at 258.

In addition, under the right set of circumstances, issues necessarily determined during a preliminary hearing in a criminal case may be precluded from re-litigation in a subsequent civil suit. *See Teitelbaum*, 58 Cal. 2d at 606-07; *McCutchen*, 73 Cal. App. 4th at 1145; *McGowan*, 208 Cal. App. 3d at 896; *Morley v. Walker*, 175 F.3d 756, 760-61 (9th Cir. 1999); *see also Haupt v. Dillard*, 17 F.3d 285, 288-89 (9th Cir. 1994) (applying Nevada law); *De Anda v. City of Long Beach*, 7 F.3d 1418, 1422 (9th Cir. 1993); *Ayers*, 895 F.2d at 1270-71; *Heath*, 813 F.2d at 258-59.

Under California law, a finding in a preliminary hearing of probable cause to hold a criminal defendant over for trial is a final judgment on the merits for collateral estoppel purposes because an accused can immediately appeal the probable cause determination by filing a motion to set aside (Cal. Pen. Code § 995) and obtain review of the decision on the motion to set aside by filing for a writ (Cal. Pen. Code § 999a). In addition, probable cause cannot be litigated further because it provides no defense for an accused at trial. *See McCutchen*, 73 Cal. App. 4th at 1146; *Morley*, 175 F.3d at 760-61; *Haupt*, 17 F.3d at 288-89. Thus, issues necessarily determined in that hearing may not be subsequently re-litigated.

As the Ninth Circuit concluded in *Haupt v. Dillard* (applying Nevada law), a determination of probable cause sufficient to bind a criminal defendant over for trial made at a preliminary hearing may estop the defendant from later seeking damages under Section 1983 by alleging his arrest was not supported by probable cause. *See Haupt*, 17 F.3d at 288-90. In *Haupt*, the Ninth Circuit found that a finding of probable cause was the *purpose* of a preliminary hearing. "[T]he probable cause determination *was* necessary to the judgment; the sole purpose of the preliminary hearing was to determine whether Haupt should have been bound over for trial. But for the probable cause determination, there would have been no trial and no judgment of acquittal." *Id.* at 289 (emphasis in original).

The *Haupt* court concluded that in most instances the *issues* necessarily determined in a preliminary hearing, and those which underscore a Section 1983 claim premised on unlawful arrest, will be the same. *See id.* at 289-90. On that basis, the court found that Haupt was estopped from bringing his Section 1983 claim:

> [T]he issue determined at his preliminary hearing is identical to the issue whether there was probable cause to arrest him; both involved a determination that the evidence available and known to the officers at the time of his arrest supported a reasonable belief that Haupt committed the offenses charged.

Id. at 289 (citations omitted). The court did identify factual circumstances that would limit or eliminate collateral estoppel effects of a prior criminal preliminary hearing. These "exceptions" identified in *Haupt* have been explicitly adopted for California preliminary hearings by *McCutchen*, 73 Cal. App. 4th at 1145-48. The California

Court of Appeals in *McCutchen* also identified a third "exception." Thus, the three situations in which a preliminary hearing will not collaterally estop a plaintiff from pursuing a later civil claim based on the same issue are: (1) where there were facts presented to the judicial officer presiding over the preliminary hearing which were *additional* to (or different from) those available to the officers at the time they made an arrest; or (2) where tactical considerations prevented a litigant/prior criminal defendant from vigorously pursuing the issue of probable cause during the prior criminal prosecution/preliminary hearing, *see id.* at 289; and (3) where a plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing. *See McCutchen*, 73 Cal. App. 4th at 1147 ("When the officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause . . . would not preclude relitigation of . . . integrity of the evidence."). In the absence of one of these three exceptions, however, California plaintiffs may not "re-litigate" the "issue" of probable cause. *R. Moreno v. Leroy Baca, et al.*, No. CV00-07149, 2001 WL 1204113 *4 (C.D. Cal. July 9, 2001).

Defendants argue that the doctrine of collateral estoppel should apply to this case because the issue of probable cause has already been litigated at the preliminary hearing and none of the three "exceptions" recognized by the California courts are present. Plaintiff contends that collateral estoppel should not apply because all three of the recognized "exceptions" apply in this case. The Court finds that collateral estoppel does not bar the instant suit because Plaintiff has presented sufficient

evidence that one of the "exceptions," the litigation strategy exception, applies. Specifically, Moreno's counsel did not vigorously pursue the issue of probable cause during the prior preliminary hearing for tactical considerations.[9]

In order to invoke the "litigation strategy exception" to the collateral estoppel doctrine, Plaintiff has the burden of showing that the issue of probable cause was not litigated at the preliminary hearing for tactical reasons. *See McCutchen*, 73 Cal. App. 4th at 1147. As the California Court of Appeals stated, "[s]ince a decision to hold the defendant over for trial requires a ruling on the sufficiency of the evidence, absent a showing to the contrary, the issue of probable cause to arrest will typically be actually litigated and necessarily decided at the preliminary hearing."[10] (emphasis added) *Id.* at 1147.

Defendants argue that Plaintiff has not made a "showing" that the issue of probable cause to arrest was not litigated because (1) Moreno's counsel at the preliminary hearing actually cross-examined the witness, Banks, thoroughly on the probable cause issue, (2) Moreno's counsel made a motion for dismissal based on insufficiency of the evidence – which amounted to a challenge only to the existence of probable cause for the arrest, since the

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[9] While the Plaintiff has also contended that the other two "exceptions" to the application of the collateral estoppel doctrine are present, the Court need not address those exceptions as the existence of one exception is sufficient to prevent the doctrine of collateral estoppel from barring the instant action.

[10] The California Court of Appeal also noted in *McCutchen*, "unless the plaintiff in a civil suit can demonstrate that the issue of probable cause was not litigated at the preliminary hearing for tactical reasons, we will presume that the plaintiff had a full and fair opportunity to litigate the issue of probable cause to arrest." *Id.* at 1147.

narcotic character of the white rock had been stipulated, *see* Motion at 8, and (3) a mere declaration by Moreno's counsel that he did not fully litigate the probable cause issue in the preliminary hearing is insufficient to substantiate a showing that the issue of probable cause was not actually litigated. *See* Reply at 3-4.

In spite of Defendants' arguments to the contrary, the Court finds that Plaintiff has made a showing that the issue of probable cause was not litigated at the preliminary hearing. First, Moreno's counsel's sworn declaration that he did not fully litigate the issues of probable cause for tactical reasons is clearly stated and substantiated by the record.[11] In his declaration, Moreno's counsel states,

> I did not fully litigate the issue of the initial stop, nor probable cause to arrest on the crime charged because that was my litigation strategy based on the fact that (i) all of the required discovery and disclosure of, *inter alia*, Brady materials and any additional materials required to be disclosed under state law, had not been made available to me as of the preliminary hearing date; (ii) it is not atypical of the deputy sheriffs of the County of Los Angeles to exclude relevant information and identities of material witnesses from their arrest reports; (iii) in this case, based on the evidence

[11] The Court agrees with Defendants' statement that the determination of whether probable cause was actually litigated at the preliminary hearing cannot be "foreclosed by a declarant's personal opinion." *See* Reply at 4. However, the Court has before it more than simply a personal opinion of a declarant. The Court has the declaration of the attorney who actually represented Moreno at the preliminary hearing, as well as the transcript of that proceeding which fully supports the declarant's assertion that he did not fully litigate the issue of probable cause at the preliminary hearing for tactical reasons.

> that came out subsequently at the trial, Banks, who had testified at the preliminary hearing, had lied about their [sic] being another person at the scene, and who in fact was with Mr. Moreno and was stopped with Mr. Moreno; and (iv) after a preliminary hearing in a case that is going to trial, it is referred to the felony trial section of the public defender's office, and the trial attorney then further investigates and prepares the defense making further discovery requests where appropriate, in part based on what evidence that was presented at the preliminary hearing as compared to the arrest report.[12]

Declaration of Michael Erpino ("Erpino Decl.") ¶ 8. Moreno's counsel's unambiguous declaration is fully supported by the record which indicates that at the preliminary hearing Moreno's counsel was specifically asked whether he was making a "1538.5 motion for probable cause"[13] by the deputy district attorney. *See* Transcript 5: 15-17, Motion, Exh. A. Moreno's counsel unequivocally responded, "[n]o. Just trying to establish the set of facts for observation purposes." *See* Transcript 5: 18-19, Motion, Exh. A.

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[12] Moreno's counsel also stated that "[i]n this case, in accordance with my litigation strategy, which depends in part on what facts I know at the time, in turn dependent upon the evidence presented by and the veracity of the testifying officer, I did not fully challenge or litigate the issue of probable cause to arrest, or the initial stop . . . [i]n accordance with my litigation strategy, I also did not challenge the alleged evidence seized by the arresting officers." *See* Erpino Decl. ¶ 9.

[13] The Court notes that a 1538.5 motion is a search and seizure motion, not a probable cause motion. *See* Cal. Penal Code § 1538.5 Motion to Return Property or Suppress Evidence (2002).

Defendants also argue that preclusive effect should be given to the probable cause issue because Moreno's counsel at the preliminary hearing, Michael Erpino ("Erpino") actually cross-examined the witness, Banks, thoroughly on the probable cause issue. However, given that Banks was the only witness presented at the preliminary hearing, and the fact that Moreno's counsel did not present any evidence negating the existence of probable cause, it is not evident that the issue of probable cause was fully litigated. As stated by the court in *McCutchen*, a "preliminary hearing is an adversary judicial proceeding, designed to litigate the issue of probable cause to try the accused on criminal charges, in which the accused may cross examine witnesses pertinent to the issue of probable cause to arrest, such as the arresting officer and the complaining witness, and present evidence negating the existence of probable cause." *McCutchen*, 73 Cal. App. 4th at 1146-47. While Moreno's counsel did indeed cross examine the arresting deputy, he did not present any evidence negating the existence of probable cause.

Similarly, Defendants' final argument that Moreno's counsel's motion for dismissal based on insufficiency of the evidence amounted to a challenge only to the existence of probable cause for the arrest, given that the narcotic character of the white rock had been stipulated, is speculative. The record does not state, and therefore, Defendants cannot purport to know, the reasoning underlying Erpino's motion to dismiss. The Court again notes that Erpino expressly stated, when asked, that he was not

making a motion on probable cause grounds.[14] *See* Motion Exh. A, *Transcript* at 5:15-19.

B. Moreno's Parole Terms did Not Limit his Fourth Amendment Rights

On October 15, 1997, Moreno was placed on parole for a period of three years. When placed on parole, Moreno signed a "Notice of Conditions of Parole" form which provided that Moreno "may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer."[15] *See* Defs.' Statement ¶ 4.

Defendants argue that since Moreno was subject to a parole search condition, Moreno had no Fourth Amendment right to be free from a warrantless detention and search. *See* Motion at 9-10. Plaintiff counters that the stop cannot be justified by a parole search condition of which the seizing officers had no prior knowledge, and where the detention was not for legitimate law enforcement purposes. *See* Plaintiff's Opposition ("Opp'n.") at 7.

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[14] Indeed, speculation on Erpino's strategy at the preliminary hearing can cut the other way and indicate that he was not investigating probable cause. For example, Erpino asked a number of questions relating to another individual who was walking near Moreno when the Government objected as to the relevance of that line of questioning. Erpino responded that he was "just trying to set the stage for who was there, who was present, who might be a witness and what happened that night." *See* Motion, Exh. A, Transcript at 6:2-7.

[15] Moreno was released on parole on October 15, 1997 for a period of three years. One of the conditions of Moreno's parole was that he, his residence and any property under his control could "be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer." *See* Motion, Exh. H.

As an initial matter, the Court notes that federal law controls analysis of this issue. *See United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) (noting that "[w]hile the federal courts may consider state precedent for its persuasive value, the validity of a search conducted by state law enforcement officers is ultimately a question of federal law" (citations omitted)); *see also United States v. Ooley*, 116 F.3d 370, 372 (9th Cir. 1997) ("While federal courts must look to state law to determine the validity of the underlying probation condition itself (citation omitted), and may consider state precedent for its persuasive value (citation omitted), the validity of a search conducted by state law enforcement officers is ultimately a question of federal law.") (citation omitted).

The validity of Moreno's state probation condition, however, is governed by California law. *See United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983). The California Penal Code authorizes the court to impose any "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer." Cal. Penal Code § 1203.1. The Court finds that Moreno's probation condition, which provides that "you and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer," *see* Motion, Exh. G, is valid. In 1998, the California Supreme Court found a probation search condition identical to Moreno's to be valid. *See People v. Rudolfo Reyes*, 19 Cal.4th 743, 746 (1998) (probation search provision identical to Moreno's accepted as valid).

Defendants argue that the search and seizure was proper under federal law because neither prior knowledge

of the parole condition nor reasonable suspicion is required to uphold a search of a parolee subject to a warrantless search condition. *See* Reply at 9. Defendants further argue that even if reasonable suspicion were required for a parole search, Moreno's actions before the search – looking over his shoulder, appearing startled at seeing the patrol car, removing something from his pocket and placing it on the steps – provided that reasonable suspicion.[16] *See* Reply at 9. Plaintiff, on the other hand, argues that the search and seizure was not proper because the Defendants did not know of the parole condition prior to the search and seizure and the search and seizure was not based on reasonable suspicion.

While neither the Supreme Court nor the Ninth Circuit has provided a clear rule on the validity of a search and seizure conducted without prior knowledge of a suspect's parole conditions, the Court finds Moreno's parole terms did not justify the search and seizure in this case. Given that neither the Supreme Court nor the Ninth Circuit have upheld searches of parolees when the officer does not have prior knowledge of the condition and where the search is not based on reasonable suspicion, and given that all justifiable factual inferences are to be drawn in favor of the Plaintiff, the Court finds that Moreno's parole

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[16] Defendants further contend that Moreno "does not dispute removing something from his pocket and placing it on the steps." *See* Reply at 9. However, Moreno clearly disputes this fact in his declaration. At paragraph 7 of his declaration, Moreno unequivocally states "At no time while we were walking did either Mr. Rodriguez or I bend or stoop to place, drop or throw anything down on the ground or on the steps of any building we passed, nor at anytime did either Mr. Rodriguez or I stop to do so." *Id.* ¶ 7.

condition does not entitle Defendants to a judgment as a matter of law.

The most recent discussion of the Fourth Amendment rights of parolees by the Supreme Court is contained in *United States v. Knights*, ___ U.S. ___, 122 S.Ct. 587 (2001). The defendant in *Knights* was subject to a parole condition that required that he "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.* at 588. The Sheriffs' Department had information which led it to suspect that the defendant, Knights, was responsible for acts of vandalism to certain facilities in the area. The Sheriffs' Department knew that Knights had agreed as a condition of probation to submit to searches or seizures with or without a warrant and with or without reasonable cause. *Id.* at 588. With this information, a sheriff's deputy conducted a warrantless probation search of Knights' apartment, which produced numerous incriminating items. The Supreme Court held that the search was lawful and concluded that only reasonable suspicion was required to search the probationer's house in that case.[17] The Supreme Court balanced the degree to which a search intrudes upon an individual's privacy and the promotion of legitimate governmental interests, in holding that the warrantless search of Knights was supported by reasonable suspicion and authorized by a condition of probation. Therefore, the search was reasonable within the meaning of the Fourth

[17] The Supreme Court also noted that the Fourth Amendment does not limit searches pursuant to a probationary condition to those with "probationary" purpose. *See Knights*, 112 S. Ct. at 590-591.

Amendment. The Supreme Court specifically declined to reach the issue of whether a search of a probationer would have been constitutional even if there had been no reasonable suspicion: "The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." *Knights*, 122 S.Ct. at 591, n. 6.

The Supreme Court reached a similar conclusion in *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164 (1987), another Supreme Court decision addressing Fourth Amendment rights of probationers. In *Griffin*, a probation officer received information from a police detective that there might be guns in Griffin's apartment. The officers had prior knowledge that the defendant was subject to a parole search condition.[18] The probation officer and a number of police officers conducted a search of Griffin's apartment, which produced a handgun. The Supreme Court upheld the search, finding that "the search of Griffin's residence was "reasonable" within the meaning of the Fourth Amendment because it was conducted pursuant to a valid state regulation governing probationers." *Id.* at 880.

Given the holdings in these two Supreme Court cases, the Court finds that at least reasonable suspicion is

[18] The regulation permitted "any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are 'reasonable grounds' to believe the presence of contraband." *Id.* at 870, 871, 107 S. Ct. 3164.

required to justify the search, and subsequent seizure, of Moreno.[19]

Defendants next argue that even if "reasonable suspicion" is required in order to justify a warrantless search and seizure of a parolee subject to warrantless searches, "reasonable suspicion" existed in this case. The Court cannot determine as a matter of law that "reasonable suspicion" existed in this case, as the undisputed actions of Plaintiff do not arise to the level of "reasonable suspicion" that existed in either *Knights* or *Griffin*. In *Knights*, the sheriffs had observed Knights with items necessary to commit the acts of vandalism a few weeks before the arson. After the arson, a deputy sheriff felt the hood of Knights' truck, which was warm. The Sheriffs had also set up surveillance of Knights' apartment and observed him existing the apartment with suspect items. *See Knights*, 122 S.Ct. at 589. In *Griffin*, a probation officer had received information from a detective that there might be guns in Griffin's apartment.

Here, neither Banks nor Garcia had received any information that would cause them to suspect Moreno of any illegal activity. Banks asserts that Moreno was in a high drug use area and "was startled by our presence" and that he saw Moreno reach into his pocket, bend to his side, place something on the stop of an apartment building and walk away. *See* Banks Decl. ¶¶ 7 & 8. However, Moreno denies reaching into his pocket, bending to his side and placing anything on the ground. *See* Moreno Decl. ¶ 7.

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[19] *See also United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) (noting that even the permissible bounds of a probation search are governed by a reasonable suspicion standard).

Thus, the facts, when viewed in the light most favorable to the nonmoving party, as is required in a motion for summary judgment, do not come close to the level of suspicion that existed in *Knights* and *Griffin*.

In addition to the requirement of "reasonable suspicion," the authority controlling on this Court does not support Defendants' contention that officers do not need prior knowledge of a suspect's warrantless search parole condition to validate a search and seizure. In *Knights*, the officers were well aware that the defendant was subject to a parole condition requiring him to submit to a warrantless search at any time. The Supreme Court did not address whether a search would be lawful if the searching officer did not become aware of the search condition until after the search had been conducted. Similarly, in *Griffin*, the probation officers and police officers who searched Griffin's apartment were fully aware that Griffin was subject to a warrantless search condition. The Ninth Circuit cases dealing with situations where a warrantless search was conducted of a parolee subject to a warrantless search condition also involved cases where the officers conducting the search knew that the parolee was subject to such a condition. *See United States v. Johnson*, 722 F.2d 525 (9th Cir. 1983) (upholding the search of a probationee's apartment when the police officer conducting the search was aware of the search condition).[20]

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[20] Defendants argue that based on California state law, prior knowledge of a warrantless search parole condition is not required to validate a warrantless search of a parolee subject to this condition. As discussed above, federal law applies, not state law. The Court notes that the California Supreme Court has upheld a warrantless search of a juveniles [sic] on probation even though the searching officer was not aware of the juvenile's probation status on the ground that the juvenile

(Continued on following page)

Therefore, the Court cannot find as a matter of law that Moreno's detention and search by Officers Banks and Garcia was justified by Moreno's parole condition.

C. Moreno's Outstanding Arrest Warrant Did Not Authorize the Actions taken by Garcia and Banks

On November 8, 1999, a bench warrant in the amount of $10,000.00 was issued for Moreno's failure to make a court appearance in state court. *See* Defs.' Statement ¶ 5; Motion, Exh. F. It is undisputed that the Deputies were not aware of the arrest warrant when they initially stopped Moreno. Exactly when the officers learned of the existence of this warrant, however, is disputed. Plaintiff contends that Banks and Garcia did not know of the outstanding arrest warrant when they arrested Moreno because they told Moreno that he was under arrest for violating his parole. *See* Opp'n. at 15; Moreno Decl. ¶ 20. Plaintiff asserts that the existence of the warrant was not noted until the day after Moreno was arrested, and that its existence was not even noted by Banks or Garcia, but by an official named "Tapia". *See* Opp'n. at 15. Defendants argue that the Officers were aware of the arrest warrant prior to arresting Moreno when they ran the MDT printout, which

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did not have a legitimate expectation of privacy. *See In re Tyrell J.*, 8 Cal.4th 68 (1994). However, in *People v. Robles*, 23 Cal.4th 789 (2000), the California Supreme Court declined to extend the holding in *In re Tyrell J.*, finding that an officer cannot rely on the probation search condition of one person to justify the search of another resident when the officer is not aware of the parole condition before conducting the search. The Court also notes that the California Supreme Court has recently declined to review *People v. Moss*, S062600, which called the holding of *In re Tyrell J.* into question.

indicated that a "Warrant: Misdemeanor" existed on Moreno's record. *See* Reply at 12; Opp'n., Exh. 7.

Defendants contend that the existence of this warrant stripped Moreno of his substantive Fourth Amendment rights not to be detained and arrested. Defendants further contend that Moreno also did not have a right to be arrested only by an officer with knowledge of the warrant. *See* Motion at 11. Defendants rely on a number of cases for the proposition that even if the Officers lacked probable cause to detain Moreno, investigate his possession of cocaine and later arrest him on that charge, Moreno's detention and arrest would not be unlawful because they were objectively justifiable on the basis of an outstanding arrest warrant. *See* Motion at 13. These cases, however, merely support the proposition that the subjective intent of an officer does not make an otherwise lawful conduct unlawful. None of these cases validate an unlawful act. It is the lawfulness of Moreno's detention and arrest that is the subject matter of the instant case.[21]

In *Whren v. United States*, 517 U.S. 808, 812 (1996), for instance, the Supreme Court held that the reasonableness of a traffic stop does not depend on the subjective motivations of the officers. In *Whren*, police officers in an unmarked car observed the petitioners in a Pathfinder truck with temporary license plates stopped at an intersection for an unusually long time. When the officers executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without

[21] The Court notes that none of the cases cited by Defendants involve factual scenarios where a suspect has an outstanding arrest warrant.

signaling and sped off at an "unreasonable" speed. When the officers stopped the truck and the driver rolled up his window, the officers observed two large plastic bags of what appeared to be crack cocaine. *Id.* at 808-09. In their appeal, the petitioners acknowledged that the officers had probable cause to believe that various provisions of the traffic code had been violated, but argued that the Fourth Amendment test for traffic stops should be whether a police officer, acting reasonably, would have made the stop for the reason given. *Id.* at 810. The Supreme Court rejected this argument and held that the constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved. *Id.* at 813. The Court stated that "[s]ubjective intentions play no role in the ordinary, probable-cause Fourth Amendment analysis." *Id.* The stop in *Whren* was lawful and uncontested; however, in the instant case, the constitutionality of the detainment and subsequent arrest of Moreno is highly contested. Defendants cannot, therefore, rely on *Whren* to support their argument that Moreno's seizure and arrest was legal regardless of the Officers' subjective knowledge or intent.

Similarly, in *Arkansas v. Sullivan*, ___ U.S. ___, 121 S.Ct. 1876, 1878 (2001), noting that the lower court had correctly refrained from questioning the officer's authority to arrest the defendant for a fine-only traffic violation, the Supreme Court held that a traffic-violation arrest would not be rendered invalid by any improper subjective motivation for making the stop.

The Supreme Court reached similar conclusions and reaffirmed the position that an officer's subjective intent does not render an otherwise legal detention or arrest illegal in *Scott v. United States*, 436 U.S. 128, 98 S.Ct.

1717 (1978) and *Maryland v. Macon*, 472 U.S. 463, 105 S.Ct. 2778 (1985). In *Scott*, the Supreme Court affirmed the lower court's finding that information garnered from an objectively proper wiretap should not be suppressed. In reaching this holding, the Supreme Court noted that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138. Similarly, in *Macon*, the Supreme Court upheld a seizure because, objectively viewed, the transaction constituted a sale in the ordinary course of business. The sale was not "retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent." *Id.* at 471.[22]

None of the cases cited by Defendants address a situation where the lawfulness of a stop, detention and arrest of a suspect is challenged and the officers rely on subsequently learned knowledge that the suspect is subject to an outstanding arrest warrant to justify the officers' actions. Rather, these cases support the proposition that the subjective intent of an officer does not render

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[22] The two state cases cited by Defendants, *In re Donald L.*, 81 Cal. App. 3d 770 (1978) and *The People v. Hai Minh Le*, 169 Cal. App. 3d 186 (1985), also fail to support Defendants' argument. *In re Donald L.* merely establishes that an arrest is valid even though the arrestee was arrested on the wrong charge. *Hai Minh Le*, like the Supreme Court cases cited by Defendants, involved a factual scenario where the search or arrest at issue was constitutionally valid and holds that "it is not essential that the arresting officer at the time of the arrest or search have a subjective belief that the arrestee is guilty of a particular crime or that the search is being conducted on the basis of a particular legal theory, so long as the objective facts, when fully determined, afford probable cause." *Id.* at 186.

otherwise lawful conduct unlawful.[23] In the instant case, it is the actual lawfulness of the stop, detention and arrest that is challenged. Therefore, the Court cannot find that the Officers' subjective knowledge or lack of knowledge of Moreno's outstanding warrant is irrelevant and that the mere existence of the warrant rendered the Officers' actions constitutional.[24]

Based on the authority discussed above, as well as the disputed facts as to when the Officers learned of the

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[23] In *Macon*, an undercover police officer purchased "obscene" magazines from a vendor with a marked $50 bill. After making the purchase and consulting with other officers as to whether the magazines were obscene, the officer returned to the store, arrested the vendor, and took back the marked $50 bill to use as evidence. The Court found that the transaction constituted a sale in the ordinary course of business and the officer's subsequent act of retrieving the marked $50 bill was not a warrantless seizure because "[w]hether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's action in light of the facts and circumstances confronting him at the time (citations omitted), and not on the officer's actual state of mind at the time the challenged action was taken." *Id.* at 470-71.

[24] In fact, the Ninth Circuit has found that contraband retrieved during an unlawful stop should be suppressed even though the officers learned of the suspect's outstanding warrant during the search. In *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973), police officers observed Luckett cross a street against a traffic light, drove up to him and waived him to the car and questioned him about the possible jaywalking. Luckett admitted his error and produced five pieces of identification. Because Luckett had failed to produce a driver's licence, the officers continued to detain him in order to run a warrant check on the name he gave. The warrant check indicated that there was an outstanding traffic warrant against him and he was subsequently arrested and searched. The Ninth Circuit suppressed the counterfeit money orders found during that search on the ground that Luckett was improperly detained. The officers, reasoned the Ninth Circuit, "had no reasonable grounds to be suspicious that there might be a warrant outstanding against him." *Id.* at 91. Accordingly, Luckett's continued detention and search were unreasonable.

existence of the arrest warrant, the Court finds that Defendants's [sic] cases fail to support their argument that the arrest warrant justified Plaintiff's search, detention and subsequent arrest. Accordingly, Defendants' motion for summary judgment is DENIED on this ground.

D. Banks and Garcia are Not Shielded by Qualified Immunity

Under *Katz*, the first question in determining whether officers are shielded by qualified immunity is whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the [officers'] conduct violated a constitutional right[.]" *Katz*, 121 S.Ct. at 1256. Defendants allege that Moreno did not suffer a violation of a constitutional right because (1) Moreno's conduct justified his detention and arrest, (2) Moreno's parole status justified his detention and search and (3) Moreno's outstanding arrest warrant justified his detention and arrest. *See* Motion at 13. As the Court has already found that neither Moreno's parole status nor his outstanding warrant justified his detention, search or arrest, the only inquiry relevant at this point is whether Moreno's conduct justified his detention and arrest.

One of the central disputed issues in this case is whether Moreno retrieved something from his pocket, bent over and placed it on an apartment step. Defendants assert that Moreno's conduct justified his detention and search because Moreno was in a high crime area, Banks observed him look in the direction of the officers and appear startled and then reach into his pocket, bend to his side and then place something on the steps of an apartment building. *See* Banks Decl. ¶¶ 7 & 8. Banks asserts

that these actions, based on his experience and training, indicated to him that Moreno was attempting to dispose of drugs. *See* Banks Decl. ¶ 4. Plaintiff alleges that he was stopped by deputies Banks and Garcia on the evening of January 21, 2000 after it was already dark. *See* Pl.'s Statement ¶¶ 6 & 8. Moreno asserts unequivocally that neither he nor Rodriguez at any time prior to or during the detention pulled something from their pockets, bent over and placed an object on the ground. *See* Moreno Decl. ¶ 7; Pl.'s Statement ¶ 8. These facts, when viewed in the light most favorable to Moreno, the party asserting the injury, show that the officers' conduct violated Plaintiff's Fourth Amendment right to be free from unlawful seizure and an unlawful arrest.[25]

On the second prong of the qualified immunity analysis, "whether the right was clearly established," *Katz*, 121 S.Ct. at 2156, the Court asks whether " 'the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The clearly established "inquiry . . . must be undertaken in light of the specific context of the case . . . ," *id.*, and with regard to the law at the time of the alleged violations. *See Anderson*, 483 U.S. at 639.

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[25] Even assuming that Moreno looked startled or nervous, those actions are clearly insufficient to provide the Officers with reasonable suspicion to detain Moreno. *See United States v. Chavez-Valenzuela*, 268 F.3d 719 (9th Cir. 2001) (finding that nervousness along [sic] is insufficient to justify a prolonged detention); *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996) (finding that nervousness and a general physical resemblance to actual suspects insufficient to justify an arrest).

At the time of Moreno's detention, preexisting law clearly required officers to establish reasonable suspicion before detaining a person. Nervousness alone has never been sufficient to create reasonable suspicion. *See Chavez-Valenzuela*, 268 F.3d at 726 (noting that no circuit has held that nervousness alone suffices to create reasonable suspicion).

Thus the appropriate question for the Court is whether, viewing the facts in the light most favorable to Plaintiff and in light of the then-existing case law, a reasonable officer in Burke's and Garcia's position would have been justified in detaining and arresting Moreno. As the case law is clear that nervousness alone does not justify a detention, the answer must be that no reasonable officer would have found that reasonable suspicion (or any exception to the reasonable suspicion requirement) existed in this case.

E. Conspiracy Claim is Dismissed

Plaintiff asserts that all of the Defendants are liable for conspiracy to violate Plaintiff's Fourth Amendment and Fourteenth Amendment Rights pursuant to 42 U.S.C. § 1983. *See* First Amended Complaint ¶ 47. According to Plaintiff, the conspiracy consisted of the Los Angeles County Sheriff's Department defendants agreeing, understanding and doing "the underlying bad acts specifically alleged in this action to plaintiff, and of all defendants understanding and agreeing to do all the things alleged against them in this complaint." *Id.* Plaintiff further asserts that Banks' and Garcia's wrongful acts could not have occurred without either the participation, willful

blindness or deliberate indifference of the non-police officer defendants. *Id.* ¶ 48.

In order to maintain a conspiracy claim under § 1983, the Plaintiff must demonstrate some deprivation of a constitutional right which resulted from the alleged conspiracy. *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121, 1126 (9th Cir. 1989); *Brennen v. Hendrigan*, 888 F.2d 189, 195 (1st Cir. 1989). In addition, to establish a conspiracy, Plaintiff must show an agreement or a meeting of the minds to violate his Constitutional rights. *Woodrum*, 866 F.2d at 1126; *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983). While it is not necessary to prove that each participant in a conspiracy know the exact parameters of the plan, they must at least share the general conspiratorial objective. *Id.* Finally, vague and conclusory allegations with no supporting factual averments are insufficient to withstand an adequately supported motion for summary judgment. *Woodrum*, 866 F.2d at 1126; *Fonda*, 707 F.2d at 438; *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983).

The Court finds that Plaintiff's conspiracy claim under 42 U.S.C. § 1983 must be dismissed as a matter of law because Plaintiff has made only vague and conclusory allegations involving a conspiracy and has failed to support these allegations with any factual assertions. In his opposition, Plaintiff asserts that he has sufficiently alleged a conspiracy claim and states that "the creepy consistency between the officers' declarations submitted on their motion, particularly when contrasted with the contradictory testimony given between these two at the criminal trial, is record evidence that these guys conspired to tell the same story, stick to their story and slam Mr. Moreno." *See* Opp'n. at 22. As an initial matter, the Court notes that

Plaintiff describes only actions between Banks and Garcia, or "these guys." Plaintiff fails to even attempt to explain how Baca or the other named defendants were part of this conspiracy.

Plaintiff also appears to assert that a conspiracy exists because "Banks and Garcia were on patrol, rabidly running on their car computer checks on people. They were looking to get someone . . . [c]oncocting a story about how light it was outside and that Mr. Moreno appeared nervous as they stalked him in their patrol car, they stopped Mr. Moreno and his friend, ran computer checks on them, found out Mr. Moreno was on parole, they decided to claim Mr. Moreno dropped drugs on some steps . . . " *See* Opp'n. at 23. Plaintiff relies on *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998) for the proposition that "when it is reasonable to infer an understanding to cover-up true fact, a conspiracy is shown." *See* Opp'n. at 23. However, the actual proposition that *Delew* supports is that circumstantial evidence may be considered in determining whether a conspiracy exists. Furthermore, the holding in *Delew* does not support Plaintiff's argument that he has shown a conspiracy, as the circumstantial evidence in *Delew* was considerably more extensive than any evidence presented by Plaintiff.

In *Delew*, the Ninth Circuit found that the lower court had erred in dismissing the plaintiffs' conspiracy claim on the ground that there was no evidence or allegation of evidence that the alleged conspirators infringed upon any cognizable protected right. *Id.* at 1222. The Ninth Circuit held that the plaintiff had pled allegations that made it reasonable to infer an understanding between the officers and the person who had killed the plaintiffs' family member, Wagner, to cover-up the true facts of the death and

thereby deprive plaintiffs of their right of access to the courts. *Id.* at 1223.[26] In stark contrast to the evidence presented to the court in *Delew*, Plaintiff here has presented only speculation as to what Moreno and Banks were doing and thinking on the evening of Moreno's arrest. These opinions do not amount to the circumstantial evidence present in *Delew*. Accordingly, the Court grants Defendants' motion for summary judgment on this ground.

F. The County's Liability: A Monell claim does not lie

In his complaint, Plaintiff alleges that all defendants are liable to plaintiff because they fostered a policy, practice, procedure and custom which constitutes violations of the Fourth and Fourteenth Amendments. These policies include, among others, planting evidence, coercing confessions from innocent persons, lying in police reports, making illegal seizures, lying under oath and suborning perjury. *See* Complaint ¶ 49.

Defendants argue that Plaintiff has failed to produce any evidence to support his claim. As evidence of his claim, Plaintiff refers to Banks' testimony that "we routinely run people that we contact to check for possible wants or outstanding warrants," (sic) *See* Opp'n. at 24, citing Def. Exh. B at 54: 6-7. Plaintiff argues that Banks' testimony indicates the existence of a policy that violated Moreno's right to be free from unlawful search and seizure. *See* Opp'n. at 24. Plaintiff also contends that Moreno's due

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[26] In *Delew*, plaintiffs had alleged that Wagner, who was married to a police officer, left the accident during the investigation and that the officers permitted her to do so. *Id.* at 1223.

process rights to a fair preliminary hearing were violated because of an unconstitutional policy of withholding and hiding identities of witnesses from arrest reports. *See id.* Finally, Plaintiff contends that these policies were ratified and condoned by the sheriff.

Under *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690 (1978), the Los Angeles County Sheriffs' Department ("LACS") can be sued for "constitutional deprivations visited pursuant to governmental custom." To establish liability, a plaintiff must show that, for each claim, "(1) [they] were deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to deliberate indifference to [their] constitutional right; and (4) the policy was the 'moving force behind the constitutional violation.'" *Mabe*, 237 F.3d at 1110-11 (quoting *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996)).

The Court finds that the Monell claim fails because Plaintiff has failed to show that LACS has a policy that violates Plaintiff's right to be free from an unlawful search and seizure and Plaintiff's due process rights to a fair preliminary hearing. Plaintiff has also failed to show that Baca ratified and condoned any unconstitutional policy. The only evidence advanced by Plaintiff for the proposition that the LACS has a policy violating his right to be free from an unlawful search and seizure is Banks' testimony that "we routinely run people that we contact to check for possible wants or outstanding warrants," (sic) *See* Opp'n. at 24, citing Def. Exh. B at 54: 6-7. This sole comment, made during an extensive cross-examination at the criminal trial and in response to Moreno's attorney's question regarding why Rodriguez was run through the "MDT," does not amount to a description of a policy that

demonstrates deliberate indifference to Plaintiff's right to be free from an unlawful search and seizure. The ambiguousness of "we routinely" does not indicate a department-wide policy as Banks could have been referring solely to himself and Garcia. The ambiguousness of "people we contact" also makes it difficult to know to whom Banks was referring and therefore, to whom any alleged practice or policy referred.

Plaintiff also contends that Morenc's due process rights to a fair preliminary hearing were violated because of an unconstitutional policy of withholding and hiding identities of witnesses from arrest reports. This policy is evident, argues Plaintiff, from Garcia's testimony, *see* Opp'n. at 24, citing Def. Exh. B at 158:13-28, Garcia's withholding of Rodriguez' existence from the arrest report and Banks' lying about the existence of Rodriguez at the hearing. *See* Opp'n. at 24. However, the Court has found no indication in the record, nor does Plaintiff refer the Court to any indication in the record, that withholding of identities of witnesses is LACS policy. There are a number of places in the transcript of the criminal trial where Officer Banks states that he did things because of his "training and experience." *See e.g.*, Defs' Exh. B at 55:27-28. However, Plaintiff has not shown that Banks followed any procedure or policy of withholding identities of witnesses from arrest reports. In fact, when asked by Moreno's counsel at trial "[i]s there a particular reason why you followed the steps that you told us the way that you did," Banks replied, "[i]t's just through training and experience . . . the way you work with your partner. *I'm not saying everybody works the same way* but I mean it's kind of hard to stay exactly the same every day because like I said, every situation is different." *See* Defs' Exh. B at

55-56. Clearly Banks was not describing any kind of departmental policy and much less any kind of policy of withholding identities from arrest reports.[27]

Therefore, Plaintiff has failed to identify any specific policies or customs that caused any alleged violations. Accordingly, the motion for summary adjudication of the LACS liability under *Monell* is granted.

G. Moreno's Class Allegations, Declaratory Relief and Injunctive Relief Claims are Stricken

Defendants also argue that Moreno should not be permitted to bring this action on behalf of a class because he has not properly alleged a class action. Fed. R. Civ. P. 23, which governs class actions requires that the following factors must be satisfied in order for a class to exist: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2245, (1997). The prerequisite of numerosity is discharged if "the class is so large that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). A motion for class certification should be filed "as soon as practicable" after a defendant's answer. *See* Fed. R. Civ. P. 23(c)(1).

Plaintiff asserts that he has satisfied all of the requirements necessary to bring a class action. However, the Court finds that these requirements have not been satisfied.

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[27] During oral argument, counsel brought a recently issued Ninth Circuit case, *Fairley v. Luman*, No. 99-56483, 2002 WL 226744 (Feb. 15, 2002), to the Court's attention. The Court has reviewed that case and is not persuaded to change its tentative [decision].

Plaintiff refers the Court to the Complaint (without any specific cite) as evidence that he has alleged that the class is so numerous that it was impractical to being all of its members before the court. However, this allegation is not found anywhere in the complaint, Plaintiff's opposition, any other filing or exhibit. While Plaintiff has alleged that his claims are typical of the claims and defenses of the class, Plaintiff has not substantiated this contention and the Court does not see how the Plaintiff can be a typical representative of the class he purports to represent. Plaintiff's status is unique because he is a detainee who was subject to an arrest warrant and parole search conditions when detained and arrested.

Most importantly, however, Plaintiff has failed to file a motion for class certification, which should be filed "as soon as practicable" after defendants answer. *See* Fed. R. Civ. P. 23(c)(1). The Court made Plaintiff fully aware of this rule, and of its disposition to entertain a motion to strike class allegations if Plaintiff failed to bring a motion for class certification within a reasonable time after Defendants filed their answer. *See* Court Minute Order, dated October 13, 2000 at 5. Defendants Banks and Garcia filed their Answer to the First Amended Complaint on December 11, 2000 and defendant Baca filed his Answer on May 1, 2001. Additionally, because the discovery cut-off date was August 31, 2001, Plaintiff would have had to conduct any discovery concerning the class prior to August 31, 2001. Therefore, over a year after the first defendants answered, Plaintiff has still not made a motion for class certification. As a motion for class certification has not been brought within a reasonable time, the Court STRIKES Plaintiff's class allegations.

Count Four of the Complaint seeks a declaration by the court that a custom, pattern and practice of Fourth Amendment violations exist. Presumably Plaintiff intended that this declaration be made as to the LACS. *See* Complaint ¶ 62. Count Five of the Complaint seeks, on behalf of plaintiff and the class he purports to represent, an injunction enjoining all of the defendants from engaging in the wrongdoing that is the subject matter of this action. *See* Complaint ¶¶ 63-69. Defendants contend that Plaintiff's declaratory and injunctive relief claims should be dismissed as a matter of law because Moreno has not established the existence of a policy or practice that threatens him or anyone else with immediate irreparable injury. *See* Motion at 18.

A plaintiff must show that he has Article III standing in order to seek injunctive or declaratory relief. "Article III standing requires an injury that is actual or imminent, not conjectural or hypothetical." *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1100 (9th Cir. 2000) (internal quotations and citations omitted). If a plaintiff has standing to seek injunctive relief, the plaintiff also has standing to seek a declaratory judgment. *See Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 261, 264, 53 S.Ct. 345 (1933) (holding that because the matter would have been justiciable as a request for an injunction, the suit for declaratory judgment was capable of federal adjudication).

In cases for injunctive relief, the plaintiff must show that he is likely to suffer a similar injury in the future. *See Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660 (1983) (finding that plaintiff did not have standing for injunctive relief because he could not show a sufficient likelihood that he would be injured in the future by the police chokehold he sought to enjoin). Injunctive relief is

unavailable where the plaintiff's claim of future injury is merely speculative. *See id.* Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects. *See O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S.Ct. 669 (1974). Courts have repeatedly held that this requirement is satisfied if the plaintiff alleges a persistent pattern of police misconduct from which a threat of future injury can be inferred. *See LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985).

Plaintiff relies on *Guerrero v. Gates*, 110 F.Supp.2d 1287 (C.D. Cal. 2000) for the proposition that the "future injury" requirement for injunctive relief is satisfied if the plaintiff alleges a persistent pattern of police misconduct from which a threat of future injury can be inferred. *See* Opp'n. at 27. In *Guerrero*, the court found that the plaintiff faced real and immediate threat of serious injury or death at the hands of the now-infamous LAPD Rampart Division CRASH officers. Unlike the substantial record of wrongdoing by the LAPD Rampart Division CRASH officers that was undoubtedly considered by the *Guerrero* court, Plaintiff has not provided the Court with any evidence showing that Moreno's injury will be recurring. In fact, Plaintiff has not supplemented his initial allegations of police misconduct with any additional evidence from which a persistent pattern of police misconduct can be inferred.

Plaintiff also unsuccessfully relies on *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) for his contention that he is entitled to injunctive relief. In *LaDuke*, the Ninth Circuit found that plaintiffs had standing to seek a permanent injunction because they had shown a "personal stake" in the prospective relief provided by an injunction. *Id.* at 1323. However, the Ninth Circuit indicated that this

finding was based on the fact that the district court had made a specific finding that the INS engaged in a "standard pattern" of improper warrantless searches and a likely recurrence of the wrongdoing. *Id.* at 1318. The Ninth Circuit noted that this finding by the district court enabled it to reach a different result than *Lyons*. As this Court has not made a finding of a "standard pattern" of improper behavior on the part of the LACS, Plaintiff cannot rely on *LaDuke* to support his argument of standing for injunctive relief.

Because Plaintiff has failed to establish a likelihood of future injury, his claim for declaratory relief must also be dismissed because it is unripe. The ripeness doctrine protects against premature adjudication of suits in which declaratory relief is sought. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507 (1967), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980 (1977). "In suits seeking both declaratory and injunctive relief against a defendant's continuing practices, the ripeness requirement serves the same function in limiting declaratory relief as the imminent-harm requirement serves in limiting injunctive relief." *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999). Therefore, since Plaintiff has failed to show imminent-harm, the Court grants Defendants' Motion for Summary Judgment on these grounds and finds as a matter of law that Plaintiff is not entitled to either injunctive or declaratory relief.

H. Rico Claims

While the Court granted defendants Banks, Garcia and Yaroslavsky's motion to dismiss the RICO claim on

October 13, 2000, and that of defendants Burke and Antonovich on February 14, 2001, the Court notes that the RICO claim still stands as to Baca, Knabe and Molina.[28] A RICO claim cannot be sustained absent an injury to "business or property." *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990). The Eleventh Circuit has held that "the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom." *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988). In so stating, the Eleventh Circuit held that RICO does not permit recovery for the economic aspect of personal injuries inflicted by acts involving murder. *Id.* at 845-48. In *Berg*, the Ninth Circuit adopted the *Grogan* rationale. "We follow the Eleventh Circuit and hold that, as a matter of law, personal injury, including emotional distress, is not compensable under ... RICO. Even if the directors had incurred pecuniary losses from emotional distress, they would not be compensable under RICO." *Berg*, 915 F.2d at 464.

Under *Berg* and *Grogan*, the Court has dismissed Plaintiff's RICO claims as to Banks, Garcia, Yaroslavsky, Antonovich and Burke. As Plaintiff's RICO claim must fail as a matter of law as to all defendants in this case, the

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[28] The Court severely admonishes defense counsel for failure to move to dismiss the RICO claims on the remaining defendants. The Court gave serious consideration to sanctioning defense counsel for its failure to properly represent defendants. However, give [sic] the Court's decision not to sanction Plaintiff's counsel (*see infra* note 3), the Court will not sanction defense counsel. However, as the Court made clear in its February 8, 2002 Order, the Court will not tolerate any future violations.

Court hereby dismisses Plaintiff's RICO claim as to defendants Baca, Knabe and Molina.

V. CONCLUSION

Based on the foregoing, the Court hereby GRANTS IN PART Defendants' Motion for Summary Judgment and DISMISSES the conspiracy claims, the claims for injunctive and declaratory relief and the class action allegations. The Court also GRANTS Defendants' Motion for Summary Judgment of the claim under *Monell*. Consistent with its Orders dated October 13, 2000 and February 14, 2001, the Court also dismisses the RICO claim as to defendants Baca, Knabe and Molina as a matter of law. The Court DENIES Defendants' Motion for Summary Judgment on all other grounds.

DATED: Feb. 25, 2002

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. MORENO, in his individual capacity and in his capacity as representative of the classes described fully herein, Plaintiff-Appellee, v. LEROY BACA; MICHAEL ANTONOVICH; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; ZEV YAROSLAVSKY, Defendants, and BANKS, Deputy Sheriff #403862; GARCIA, Deputy Sheriff #412525, Defendants-Appellants.	No. 02-55627 DC No. CV 00-07149 ABC CD Cal ORDER (Filed Apr. 13, 2005)

Before: PREGERSON, TASHIMA, and CLIFTON, Circuit Judges.

The State of California (the "State"), through its Attorney General, has moved to intervene in this appeal pursuant to 28 U.S.C. § 2403(b), as a matter of right. Plaintiff-Appellee ("Plaintiff") opposes the motion, contending that this case does not qualify under § 2403(b).

We have, however, allowed a party permissively to intervene on appeal by analogy to Fed. R. Civ. P. 24(b). *See Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). Thus,

even assuming *arguendo* that the State is ineligible to intervene as a matter of right under § 2403(b), a question we need not decide, we deem this to be the unusual case in which the State should, nonetheless, be permitted to intervene. *See Bates*, 127 F.3d at 873.

The State of California's motion to intervene on appeal is granted. The State shall file its Intervenor's Petition for Rehearing within 21 days of the filed date of this order. Plaintiff may file an optional response to said petition. If an optional response is filed, it shall be filed within 21 days of service of the foregoing petition upon Plaintiff.

The caption of this case shall be amended to add at the end thereof:

STATE OF CALIFORNIA,

Intervenor-on-appeal.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. MORENO, in his individual capacity and in his capacity as representative of the classes described fully herein, Plaintiff-Appellee, v. STATE OF CALIFORNIA, Intervenor, v. LEROY BACA; MICHAEL ANTONOVICH; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; ZEV YAROSLAVSKY, Defendants, and BANKS, Deputy Sheriff #403862; GARCIA, Deputy Sheriff #412525, Defendants-Appellants.	No. 02-55627 DC No. CV 00-07149 ABC CD Cal. **ORDER** (Filed Jan. 23, 2006)

Before: PREGERSON, TASHIMA, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Pregerson and Clifton vote to deny the petition for rehearing en banc and Judge Tashima so

recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.

(2)

Supreme Court, U.S.
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No. 05-1351

In The Supreme Court of the United States

SHERIFF LEROY BACA,
DEPUTY SHERIFF SEAN BANKS and
DEPUTY SHERIFF THOMAS GARCIA,

Petitioners,

v.

RICHARD MORENO and
THE STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI (Rule 15.8)

SCOTT WM. DAVENPORT*
MANNING & MARDER,
KASS, ELLROD, RAMIREZ LLP
1 Park Plaza, Ste. 500
Irvine, CA 92614
Telephone: (949) 440-6690
Facsimile: (949) 474-6991

Attorneys for Petitioners Sheriff Leroy Baca, et al.

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

INTRODUCTION

On April 21, 2006, SHERIFF LEROY BACA et al. filed the Petition for Writ of Certiorari in this case, which raised two issues which were not addressed by *Samson v. California*, Supreme Court Case No. 04-9728. Specifically, the petition questioned if a police officer's subjective knowledge of a parole search condition was dispositive in determining whether the search was constitutional.

Thereafter, on May 22, 2006, this Court issued a **unanimous** opinion in *Brigham City v. Stuart*, 547 U.S. __, 2006 US LEXIS 4155 (2006), which held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.[1] In so holding, this Court reiterated the long-standing rule that an officer's subjective motivation is irrelevant for the purposes of determining whether a Fourth Amendment violation has occurred. Slip Opinion at p. 5; see also *Bond v. United States*, 529 U.S. 334, 338, n. 2 (2000); *Whren v. United States*, 517 U.S. 806, 813 (1996); *Graham v. Connor*, 490 U.S. 386, 397 (1989).

As stated in the petition, under California law, as a condition of early release from prison, all parolees are required to submit to warrantless, suspicionless searches. California *Penal Code*, § 3067. Although the California Legislature could have imposed the additional requirement that any such search be based on either foreknowledge of

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[1] Petitioners are submitting this supplemental brief pursuant to Rule 15.7 for the limited purpose of calling attention to this new case, which was not available at the time of petitioners' last filing.

the search condition or a non-law enforcement, parole purpose, the Legislature chose not to do so.

Similarly, this Court has consistently rejected attempts to tie claims of constitutional error to the motives, intents, or other states of mind of particular police officers. *Devenpeck v. Alford*, 543 U.S. 146, 153-154 (2004); *Whren v. United States*, 517 U.S. at 813. These and other cases stand for the proposition that objective facts, rather than subjective knowledge or suspicions, should be considered in deciding the threshold question of whether or not a person's own legitimate rights could potentially be violated by the contested police conduct. If it appears from the objective facts that no violation could occur, the constitutional inquiry is ended.

However, both the California Supreme Court in *People v. Sanders*, 31 Cal.4th 318, 2 Cal.Rptr.3d 630 (Cal. 2003) and the Ninth Circuit in *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005) are attempting to graft a subjective knowledge element into this analysis. As argued in the petition, these efforts constitute a serious departure from prior case authority from this Court; and, moreover, they also represent a serious departure from this Court's recent decision in *Brigham City*.

THIS COURT'S RECENT DECISION IN *BRIGHAM CITY V. STUART* LENDS FURTHER SUPPORT TO THE PETITION FOR CERTIORARI

In *Brigham City*, police officers responded to a loud party call that quickly devolved into a "melee." Slip Opinion at 1. Upon arriving at the residence, the officers observed numerous juveniles drinking beer, and a violent

attack occurring which left the victim "spitting blood into a nearby sink." Slip Opinion at 2. The officers also observed individuals trying to restrain the attacker by pressing him against a refrigerator with such force that the refrigerator began moving across the floor. *Id.*

The officers approached the home, opened a screen door, and announced their presence. When no one noticed the officers' presence – presumably as a result of the tumult inside – the officers entered the home. Thereafter, numerous arrests were made for contributing to the delinquency of a minor, disorderly conduct, and intoxication. *Id.*

Recognizing that the presence of an exigency is an exception to the warrant requirement (see *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)), the arrested individuals argued that the search was invalid because the officers "were more interested in making arrests than quelling violence" and, in so doing, called into question the subjective motivation of the individual officers. Slip Opinion at 4-5.

In a unanimous opinion, this Court clearly and unequivocally rejected this argument, stating:

> "Our cases have repeatedly rejected this approach. An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.' [Citations.] It therefore does not matter here – even if their subjective motives could be so neatly unraveled – whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and

prevent further violence." *Id.* at 5-6 (emphasis in original).

In this case, MORENO, like the individuals who were arrested in *Brigham City*, seeks to graft a subjective knowledge requirement into the analysis. These actions are wholly improper. Instead, as this Court aptly noted in *Brigham City*, "the officer's subjective motivation is irrelevant." *Id.* at 5.

Objective facts, not subjective knowledge, should be considered in deciding the threshold question of whether or not an individual's rights could potentially be violated by the police conduct in question. Stated another way, courts should focus – first and foremost – on whether a constitutional right even exists before they slavishly analyze whether police officers could have had more facts prior to conducting a given search.

Put simply, if a parolee has agreed to submit to warrantless, suspicionless searches, the parolee has no right to be free from such searches. And, accordingly, any such search necessarily cannot infringe any constitutional right, so long as the search is conducted in an otherwise reasonable manner.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that this petition be granted and that this Court hold that neither reasonable suspicion nor subjective police foreknowledge of a search condition is required for

otherwise reasonable police intrusions, since the individual has no legitimate expectation to remain free from such detentions or searches.

Respectfully submitted,

MANNING & MARDER, KASS, ELLROD, RAMIREZ LLP

SCOTT WM. DAVENPORT*

Attorneys for Petitioners, Sheriff Leroy Baca, Deputy Sheriff Sean Banks and Deputy Sheriff Thomas Garcia

**Counsel of Record*